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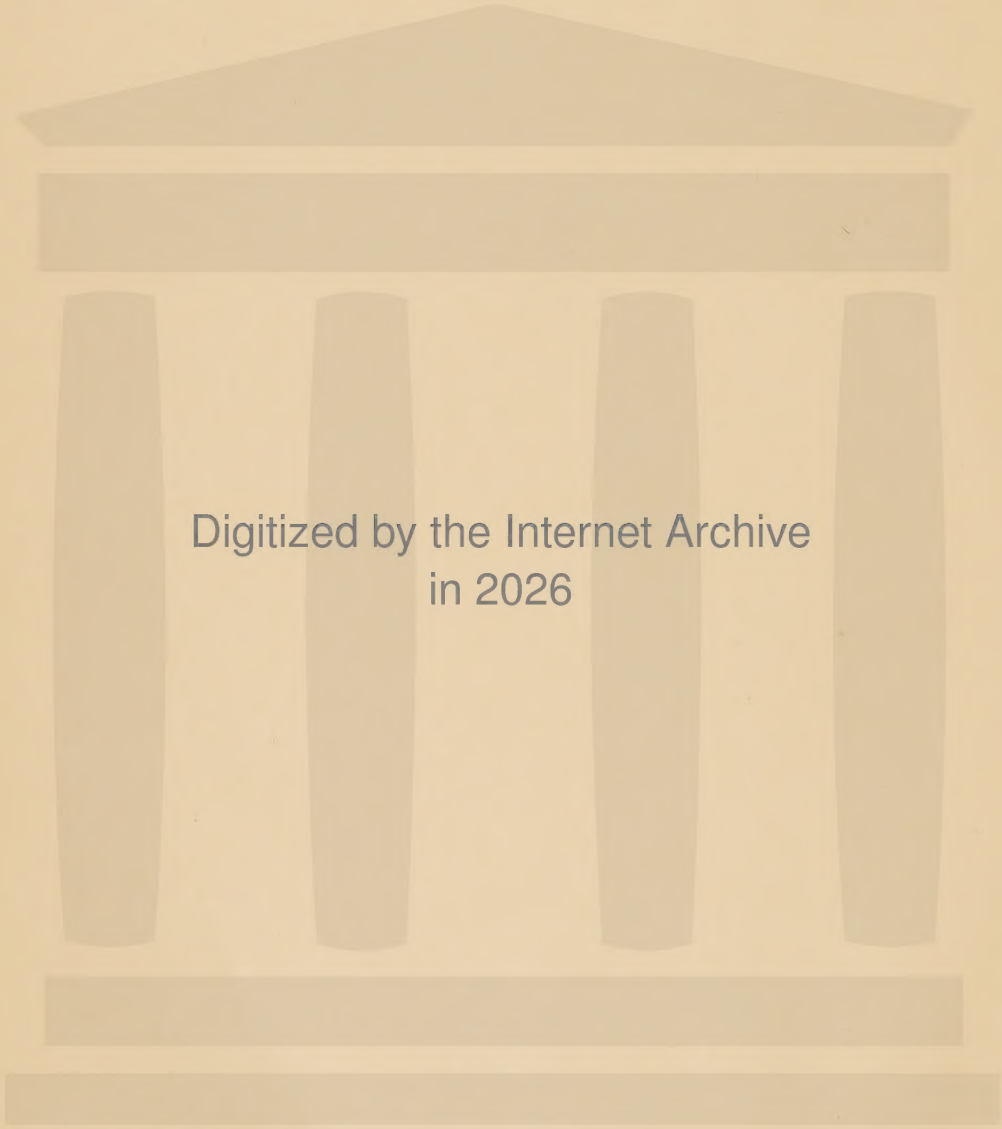

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VOLUME I

1931-1932

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VOL. 1

1931-1932

ALBANY LAW SCHOOL
ALBANY, N. Y.

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L A W R E V I E W

A Discussion of Legal Principles

Suggested by Recent Decisions

* * * * * *

Issued Four Times During The Academic Year

By The Law Review Board of

ALBANY LAW SCHOOL

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November 1931

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PHYSICAL CONTACT AS REQUISITE TO A CAUSE OF ACTION IN NEGLIGENCE

The defendant was driving negligently. Mrs. Comstock saw the defendant's car approaching the one in which she was riding; she felt the jar as the two nosed together; she heard the "grating sound" of metallic contact; she saw the left fender of the car in which she was riding crumple under the blow. She stepped out to get the defendant's name and license number. She started to write them down, fainted, struck her head on the sidewalk in falling, fractured her skull, and died almost immediately. The defendant asserted, through the mouths of expensive counsel, that the plaintiff could not charge her with liability for Mrs. Comstock's death if the jury were to find that "the deceased at the time of the collision sustained only shock or fright, without physical injury". But Judge Lehman, writing in his most opaque style, denies this theory, saying, "no slight physical injuries (at the time of the collision) in addition to those resulting from the shock would fortify the plaintiff's claim." (Comstock v. Wilson, 257 N.Y. 231).

Thirty-five years ago in the case of Mitchell v. Rochester Railway Co. (151 N.Y. 107), Judge Martin said (at page 110) "No recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury." To paraphrase - immediate personal injury is necessary, in addition to injuries resulting from shock or fright caused by a defendant's negligent act, to fortify the plaintiff's claim. The Lehman opinion has qualified Judge Martin's statement. The extent of the qualification can be measured by substituting, in the sentence quoted from the Mitchell case, for the phrase "no immediate personal injury", the words "no contact", or better still, "no battery". The Mitchell case is not overruled. Its doctrine, startling in its apparent inhumanity, is confined strictly to the facts as they occurred there.

Mrs. Mitchell waited to board a horse car on a busy street in Rochester. A team of horses drawing another car came galloping down the tracks toward her. The driver of the second car was negligent in checking the horses' speed. They swerved to the right. When they finally stopped, they were so close to Mrs. Mitchell that she was standing between their heads. She fainted from the fright thus caused her, and, as women will, had a miscarriage. It was for this injury that the court denied her relief. There was no immediate physical injury resulting from the negligent act of the defendant. To that lack was assigned the reason for non-recovery. But no more was there immediate physical injury in the Comstock case. However, in the latter case, the automobile in which the deceased sat was struck, and the consequent jar to the passengers, slight though it was, constituted a battery. The battery supplies the link needed to bind reparation to injury.

Mrs. Mitchell's misfortune stands, then, a legally irreparable loss. The case still will present to legal neophytes an illogical, impractical exception to the general rule they have been taught - that for every wrong, the law will strive to afford a remedy. Their minds, accustomed to the pragmatic justice of Contracts, the practical idealism of Legal Ethics, the century-hallowed rules of Domestic Relations, will reject the theory that Mrs. Mitchell suffered no wrong. Yet just that was held in 151 N.Y. and it is reaffirmed, though distinguished, in 257 N.Y. I think the rule of the Mitchell case is one product of the mill of justice which has not been ground exceeding fine; it impresses one rather, as being a sort of juridical whole-wheat.

The reasons given for the rule are three: (Mitchell v. R.R., supra). First, since there can be no recovery for fright, there can be no recovery for the results of fright. Second, the physical injuries are not proximate to the negligence. Third, exigencies of the administration of justice require the rule. With becoming obeisance to precedent and to the opinions of those far more learned in the law than I ever hope to be, I proceed to criticize these reasons.

Referring to the first reason: In the Mitchell case, Judge Martin writes, "assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom."

The syllogism of which this statement is the conclusion would read:

1. Deeds that cannot form the basis of an action allow of no remedy for injuries resulting therefrom.
2. Fright cannot form the basis of an action
3. Ergo, there is no remedy for injuries resulting from fright.

But the major premise, number one, is false as it applies to tort law. There, injury is an element in the cause of action. The tort, existing in isolation, is not actionable. An uppercut, delivered in the privacy of one's bath is no more actionable than admittedly reckless driving in a road unoccupied except for the reckless driver; yet both these acts would be actionable when injury results to another. Fear is not a basis for a cause of action because it is not a legally recognizable injury; it is too slight and fleeting an emotion to allow of admeasurement; but when results follow that are admeasurable (e.g. Mrs. Mitchell's injuries) they should serve as the basis for recovery.

Thus the premise of the syllogism is false, and necessarily the conclusion errs with it. Judge Lehman grants, "Its (the Mitchell case) conclusions cannot be tested by pure logic." I agree.

Secondly, the physical injuries are not proximate to the negligence. Mere mention of this reason for non-recovery is automatically to imply inability to discuss it. But I must try. The doctrine of proximate cause is the practical solution to the question of the limit of liability. A person shall be liable only for the proximate results of his tortious acts. The concept of

causal proximity ranks with that of Due Process of Law in indefiniteness. It is suggested in the Mitchell case that "proximate damages are such as are the ordinary and natural results of negligence," which definition necessarily varies with subjective opinions of what is ordinary and natural. By that definition, Judge Martin says plaintiff's miscarriage was not proximate to defendant's negligence - that it was the result of an "unusual combination of circumstances." Judge Lehman in the Comstock case says, "Serious consequences from mere mental distrubance unaccompanied by physical impact cannot be anticipated, and no person is bound to be alert to avert a damage that foresight does not disclose."

In general, those things are considered proximate to the defendant's act which follow therefrom in an unbroken chain, not spliced in with any other independently acting chain of causation. In the Comstock case, it is said, "the fright was only a link in the chain of causation between collision and fractured skull." In the Mitchell case, the fright was not considered a link in the chain naturally following the negligence, for the resultant injuries were not considered proximate. Fright can be a link between tort and injury. Injury can be proximate to a tort, though fright intervenes. This restatement of the effect of fright on recovery makes it probable that the Mitchell case would not, today be decided on the ground of proximate cause.

Thirdly, exigencies of the administration of justice require the rule. This reason is the only theoretically sound one proposed. Judge Lehman says, "where there has been no physical contact, there is danger that fictitious claims may be fabricated." A Pennsylvania Judge states, "It requires but a brief judicial experience to be convinced of the large proportion of exaggeration and even of actual fraud in the ordinary action for physical injuries from negligence, and if we opened the door to this new invention (recovery for fear, without contact) the result would be great danger if not disaster, to the cause of practical justice." (Huston v. Freemansburg, 212 Pa. 548)

It is though, then, that allowing such recovery would flood the courts with litigation and would lend increased opportunity to fraudulent litigants. The best answer to the first claim is an inspection of the English courts which, after a short period of following the rule of the Mitchell case, (Victorian Rys. v. Coultas, L.R. 13 A.C. 222 (1888)) cast it aside and allowed recovery for injuries received from fright caused by defendant's negligence without contact. (Coyle v. Watson, A.C. 1 (1915)). Along with that inspection a glance at the trial calendars of the seventeen states of the United States allowing such recovery, including California (179 Cal. 298), Maryland (111 Md. 69), Minnesota (48 Minn. 34), Rhode Island (28 R.I. 186), and Wisconsin (141 Wis. 146) would show no such crowded conditions as the proponents of the rule of non-liability would forecast.

As for the second result feared by our court, that fraudulent litigation would be more successful, and more prevalent, I feel that it is not consistent with our theories of jurisprudence.

Justice Kennedy, in Dulieu v. White & Sons, (1901) 2 K.B. 669, expresses his opinion of this "hands-off" policy of the court by saying, "Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claims."

Says the New York Court, in effect, 'Sue when you become nauseated by finding and looking at a fraction of a mouse in your tobacco can, left there by the manufacturer's negligence (Foley v. Liggett-Myers Tobacco Co., 136 Misc. 468); sue when the car in which you are riding is touched by the defendant's negligent forces and injuries follow, not from the touching, but from the fear (The Comstock case); then we have the power to judge the honesty of your claim. But, if two draft horses come within inches of stepping on your shoulders, do not come into our courts for redress. We can't determine in this sort of case if you are telling the truth.' It might better be expressed, 'we refuse to determine whether you are telling the truth.'

A public policy which, because of danger of overcrowding its tribunals (in which all who are wronged should be welcome), refuses redress to the persons it should protect, or because of fear of fraudulent claims (which, if carried to a logical conclusion, would preclude all litigation) closes its tribunals to a whole class of suitors, is a policy, public in name only, a benefit alone to the occasional defendant profiting thereby.

I have shown my distaste for the rule in the Mitchell case, my distrust of its logic, and my dismissal of its practical foundation. The Comstock case qualifies the rule, from a prerequisite of physical injury arising immediately from defendant's negligence, to one of physical contact, apparently of any slight degree. Even this is arbitrary, with no sound basis in reason. But one qualification may well presage others. The wind seems to be blowing in the right direction. One more good gust of clear judicial reasoning will, I hope, whisk the haphazard rule of the Mitchell case out of that orderly structure that is our judicial system.

G. R. B.

THE DOCTRINE OF MERGER AS APPLIED TO CONSPIRACY

The defendants were indicted in the county of Kings for the crime of conspiracy. The indictment charged that they unlawfully conspired to cheat several banks out of money and property. The overt acts set forth in the indictment indicate that in carrying out the conspiracy the defendants committed other acts which constituted felonies. Demurrers were filed to the indictment and sustained on the ground that the misdemeanor charged would merge in the felonies committed pursuant to it. The Court of Appeals reversed the trial judge and Appellate Division and overruled the demurrers. (People v. Tavormina, 257 N.Y. 84).

This decision on the part of the Court of Appeals is important not only because it settles a debatable question of law but also because it marks a definite change in judicial reasoning during the last century on this question and those necessarily involved in deciding it. English courts of a century ago universally upheld the doctrine of merger in all cases where the crime contemplated by the conspiracy was completed and was a felony.

The conspiracy itself was only a misdemeanor. The legal theory at the time, that when the lesser offense met the greater the lesser was absorbed by the greater, was applied in all cases of trials for misdemeanors where the evidence showed the commission of a felony. The different conception of misdemeanors and felonies at that time was in part responsible for this, for not only was there a feeling that the king had an interest in a conviction for a felony and its attendant forfeiture, but also the defendant was deprived of the right of counsel, and limitations were put upon his right to challenge jurors and to see the indictment.

The first case decided in this country which has remained until recently the most cited and followed authority was Commonwealth v. Kingsbury, 1809 (5 Mass. 106). There the defendant was indicted for conspiracy to obtain money and property under false pretenses, which conspiracy was executed. The court followed the English rule saying, "Had the conspiracy not been effected, it might have been punished as a distinct offense; but a contrivance to commit a felony, and the executing the contrivance, cannot be punished as an offence distinct from the felony, when committed pursuant to it. (p. 107.)

The New York courts have cited this case a number of times, but it has always been in support of dictum and, consequently, not controlling. Yet, reiterated repeatedly as it was, there can be no doubt that the courts of this state were of the opinion that a conspiracy did merge in a consummated felony contemplated by it. First, in the case of Lambert v. People, 1827, (9 Cowen 578) where the completed crime was only a misdemeanor, so this question was not in issue, the court stated that there might be a merger in cases where the completed crime was a felony.

They favored the point of view expressed in Commonwealth v. Kingsbury (supra), that previous acts are all absorbed in the offense, saying, "It is urged that this indictment charges an executed conspiracy, that the first agreement to commit the offense and every other preliminary and intermediate step, is absorbed in the actual commission of it. I cannot conceive how a crime can be split up into several parts, and each of these parts made the subject of accusation." (p. 593). Again, in People v. Mather, 1830, (4 Wend. 229), where the two crimes were only misdemeanors, the court held that in such cases there could be no merger, but that there would have been in the event that the completed crime had been a felony.

In Elkin v. People, 1863, (28 N.Y. 177, although the contemplated crime was not completed, it was held that, had it been completed, the conspiracy to commit it would have merged. Until within the last thirty years the courts of this state indicated either by dicta, or by decisions directly in point, in some of the lower courts, that this was the law. (People v. McKane, 7 Misc. 478; People v. Thorn, 21 Misc. 130; People v. Wiechers, 79 N.Y. 459).

The decision in Commonwealth v. Kingsbury (supra) was followed and became the ruling law in many jurisdictions. In spite of the fact that its own decision had been the foundation for many others, Massachusetts in 1871 by Commonwealth v. Walker, (108 Mass. 309) directly overruled this earlier decision. This later case was followed in the cases of Commonwealth v. Andrews, (132 Mass. 263); Commonwealth v. Stewart, (207 Mass. 563); Commonwealth v. Marsina, (252 Mass. 224). A majority of the other states have adopted this later rule by reversing former decisions or deciding for the first time that a conspiracy and the crime contemplated by it are separate and distinct.

The decisions in the Federal Courts follow this conception of a conspiracy, holding that it is a separate crime. In Goldman v. United States, (245 U.S. 474) the court said that unlawful conspiracy "is, in and of itself, inherently and substantively a crime, punishable as such irrespective of whether the result of the conspiracy has been to accomplish its illegal end". (p. 477). Again in United States v. Rabinowich, (238 U.S. 78), "For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime". (p. 88)

The courts of this state in People v. Peterson, 1901, (60 A.D. 118) held that the accomplishment of the felony did not cause a merger, as it was not the crime contemplated by the conspiracy, but only one step toward it. In this case the courts refused to comment on the effect if the felony had been the crime contemplated. Since then our courts have been increasingly hesitant to support the dicta in Lambert v. People, (supra) and People v. Mather, (supra, but have tended toward the more modern and logical doctrine of no merger. This is so in part because of the change in conception of misdemeanors and felonies which has rendered their method of prosecution and punishment sufficiently similar that the prosecu-

important part of our system of justice. The former difference being the only ground for upholding the doctrine of merger its disappearance renders the continuance of the doctrine unwarranted. Now in the case of People v. Tavormina, (supra), unhampered and unembarrassed by anything save ancient dicta, the court felt free to definitely and unequivocably support the modern and logical doctrine now accepted in a majority of the state and federal courts, that a conspiracy is a separate and distinct crime, not merging in the completed crime contemplated by it.

L. P. W.

CONTRIBUTION BETWEEN JOINT TORT FEASORS

Section 211-A of the Civil Practice Act was passed by the Legislature of the State of New York in 1928, and became effective September 1st of that year. It has become the subject of much and varied interpretation due in part to the alleged ambiguity of the language used therein and in part to the apparent desire of the Courts to remedy completely an inequitable situation which existed prior to the passage of the Act. Turning to the section we read that:

> "Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payment; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his pro rata share of the entire judgment ....."

One of the questions which still remains unanswered by the Court of Appeals is, has the Supreme Court power to implead an unsued joint tort feasor as an additional defendant under Section 193, Subdivision 2, and Section 211-A of the C.P.A. on the motion of the original defendant, his fellow tort feasor? Following is Section 193 (2), in part:

> "Where any party to an action shows that some third person, not then a party to the action, is or will be liable to such party wholly or in part for the claim made against such party in the action, the court, on application of such party, may order such person to be brought in as a party to the action ..... so that the claim of such moving party against such person may be determined in such action, which shall thereupon proceed against such person as a defendant therein to such judgment as may be proper."

The Appellate Division, Third Department, recently passed upon a situation which squarely presented the question to be discussed, in the case of Schenk v. Bradshaw (233 A.D. 171). Here the plaintiff was riding in an automobile owned and driven by one Wafer. Plaintiff was injured when said car collided with defendant's automobile. Upon being sued, defendant moved under Section 193 (2) to bring in Wafer as a party defendant, claiming, in his affidavits, that the accident occurred solely through the negligence of Wafer. Plaintiff opposed the motion blaiming that she would be prejudiced because the trial of the action would be delayed, and her interests would be lost sight of on the trial of the case in the contest between defendants, each trying to prove the sole liability of the

other. The order was granted and affirmed upon the authority of Haines v. Bero Engineering and Construction Co., (230 A.D. 332).

Turning to Section 193 (2) we find that it was originally in the Code of Civil Procedure and was last amended in 1933. It obviously was not the intent of the Legislature, at the time this sbudivision was enacted, that under it one joint tort feasor defendant might bring in another joint tort feasor as a defendant because of the fact that at the time of the enactment of said subdivision there was no contribution among joint tort feasors. Contribution was first permitted in 1928 with the passage of 211-A. We find further that the interpretations under the Statute were practically uniform, and culminate in the leading case, prior to the enactment of 211-A, of Greenhouse v. Rochester Taxicab Company, (218 A.D. 224), wherein the Appellate Division unanimously reversed an order bringing in a joint tort feasor in a negligence action analogous to the Schenk case, holding that "it is not enough to consult the convenience of the defendant alone." Thus, we conclude, if the decision in the Schenk case is the law, that Section 211-A was intended to overthrow the well-established rule set down in the Greenhouse case.

Turning back to the section itself, the paramount inquiry is, what was the intention of the Legislature in passing Section 211-A? Prior to the passage of the section it was well established, and in fact, had been the rule in this State since Peck v. Ellis, (2 Johns. Ch. 131), that there should be no contribution among joint tort feasors. This rule was highly inequitable for the reason that a defendant in a negligence action against whom a judgment had been rendered jointly with another, and who was forced to pay the judgment, was left without a remedy against his equally guilty joint tort feasor. This was the status of the law when 211-A was proposed and the statute as worded leaves no doubt in the mind of the reader that his condition was sought to be alleviated by the enactment of said section.

But was this the sole intention of the Legislature? Was it intended also to give a defendant the right to implead, on motion under 193 (2), an unsued fellow tort feasor, in order that a joint judgment might be had against both and thus place the original defendant in a position to take advantage of 211-A and enforce contribution if both are found liable? Was it intended to deprive the plaintiff of the common law right of deciding for himself whether he would sue one or all of the wrongdoers? The Courts have so held.

The case of Haines v. Bero, etc, (supra), was the first case involving the situation under discussion to reach the Appellate Division, and has since been followed by other Departments of the Appellate Division and the Justices of the Supreme Court. Crouch, J., writing for an unanimous court, holds in effect that since the defendant has shown by his affidavits that he can adduce evidence which would clearly warrant the jury in finding concurrent proximate, if not sole, negligence on the part of the third person sought to be brought in he "shows" within the meaning and intent

of 193 (2) "that some third person, not then a party to the action, is or will be liable...." He then takes the next step by holding that such a liability as is mentioned in 193 (2) does exist by virtue of 211-A provided that the third person is brought into the action so that the finding may eventuate in a joint judgment. Taking the next step, he argues that it must have been and was the intent of the Legislature to allow a defendant to take advantage of this right, and thus to place his fellow tort feasor in a position where contribution can be enforced. As he states,

> "The statute grants a substantial right, It was not intended, we think, that the opportunity of a defendant to utilize that right should depend solely upon the will of a plaintiff; nor should the courts thwart the legislative purpose by a narrow interpretation of a practice rule nor by the use of discretion too restricted in scope."

The court in Fox v. Western New York Motor Lines, (233 A.D.308 summarizes:

> "We deemed the right under Section 211-A C.P.A. substantial and since it was unenforceable in the absence of a joint judgment we construed Section 193, C.P.A. as granting a subordinate procedural right to bring in an unsued tort feasor as a step in the process of transforming the right which was then inchoate into an enforceable one embodied in a joint judgment."

The cases which have been decided since the Haines case, although different in fact, proceed from the same premise. Dee v. Spencer, (233 A.D. 217) holds that the plaintiff, who is suing two defendants for negligence, may not, after the evidence is closed, submit to a voluntary non-suit as to one of the defendants. In the Fox case (supra) it was held that since a substantial right is granted by 211*A it may not be defeated by a release given by the plaintiff to a joint tort feasor. In Ackerson v. Kibler, (138 Misc. 665) the defendant moved to bring in the husband of the plaintiff. The court denied the motion on the ground that a wife cannot maintain an action in tort against her husband at common law and the rule had not been changed by subsequent legislation.

It is the opinion of the writer that the decision in the Haines case upon which the Schenk case is based is unsound. While Mr. Justice Crouch is to be commended upon his liberal interpretation of the section under discussion, it seems that he has exceeded the realm of the judiciary in construing legislation, and has usurped legislative powers. It is an instance "where the wish is the father to the thought."

Keeping in mind that a statute in derogation of the common law must be strictly construed we pass to an analysis of the statute itself. There are two prerequisites to be met before contribution can be enforced. First, there must have been a joint judgment, for the section reads, "Where a money judgment has been recovered jointly..." and second, the defendant must have paid more than his pro rata share of the judgment, "each defendant who has paid more

than his pro rata share shall be entitled to contribution..." The enactment is preceeded by words of specific limitation which allow contribution only after a joint judgment has been obtained. The language used by the Court of Appeals in Price v. Ryan, (255 N.Y. 16) decided subsequent to the Haines case but prior to the Schenk case, clearly holds that a judgment must have been obtained against the joint tort feasors, and, in my opinion, intimates that it was the intent of the Legislature to limit the section to this specific and sole situation. The court states, (underlining mine):

> "The Civil Practice Act (Section 211-A) in furnishing to one joint tort feasor a remedy for the recovery of contribution from the other expressly confines the one joint remedy to cases where a money judgment has proceeded against both. At common law Ryan would have had no cause of action in contribution. Under the statute he has none since no judgment against his joint tort feasor has been had."

A criticism to be made of the Haines case is that the major premise upon which the decision is based is unsound. It will be noted, as hitherto stated, that the decision in the said case was based on the ground that the statute granted a substantial right. It is respectfully submitted that the error in the Haines case is traceable to this premise, and that this premise is directly opposed to language of the Court of Appeals in placing construction upon the section. In the case of Deuscher v. Cammerano, (256 N.Y. 328) likewise decided after the Haines case but prior to the Schenk case the Court states in referring to 211-A:

> "The effect of this amendment as to two joint tort feasors who are financially responsible is the same as if it changed the plaintiff's remedy in the collection of a judgment by providing that each joint tort feasor was liable only for his pro rata share of the judgment. This would be a change in the remedy and effect no substantial rights, at least create no new ones. The same result is accomplished by the provision that, if the plaintiff collects all the judgment out of one, the other must pay his share to that one."

And further at page 332,

> "The change relates to the remedy - to an unnecessary and unjust inequality in procedure."

Also in the Price case in that portion of the opinion which is quoted above we read:

> "The Civil Practice Act (Section 211-A) in furnishing to one joint tort feasor a remedy for the recovery of contribution ..."

Thus, the Court of Appeals infers, at least, that the section does not create a substantial right but a procedural right merely. Obviously, the opinion of the Appellate Division must yield to that of the higher court.

Analyzing Section 193 (2) we find that "Where any party .... shows that some third party... is or will be liable to such party wholly or in part for the claim made against such party.... the court may order such person to be brought in ... so that the claim of such moving party against such person may be determined in such action....."

This section has been construed to mean that where the original defendant has come claim against the party sought to be brought in who is or will be liable his motion will be granted. As for example, where a surety is sued upon his contract of suretyship, he might bring in his principal; an employer being sued for some tortious act of an employee might bring in the employee; one of several persons jointly liable on a contract might bring in his co-obligors for the purpose of establishing his right to contribution from them.

It is difficult to see how Section 211-A could logically be interpreted to affect Section 193 (2). The original defendant in the class of cases under discussion has no claim against the third party for which the latter is liable wholly or in part. There are no rights to be adjudicated in the same action so that the actual wrongdoer will be ultimately liable. Section 211-A allows contribution after a judgment has been rendered against the joint tort feasors and then only when the original defendant has paid more than his proportionate or pro rata share of the judgment.

Furthermore, it is to be deduced that the Haines case is an erroneous interpretation because of the fact that such an interpretation would lead to inequitable results. In fact, in the Fox case (supra), the court in following the reasoning set forth in the Haines case arrived at an unjust and unfair result. In that case the plaintiff had executed a conditional release of one of two joint tort feasors for a valid consideration. The defendant was allowed to bring in as a party defendant the person to whom the plaintiff had given the release. The court held that the release was ineffective to prevent the defendant from bringing in the released party. The effect of such an interpretation of 211-A caused Coyle, J. in Rothman v. Byron, reported in the New York Law Journal for October 30, 1931 to write as follows:

> "The effect of such an interpretation will be to prevent the settlement of claims for personal injuries or property damage wherever there is any other person or persons against whom, by any stretch of the imagination, the plaintiff might make a claim. No defendant could ever buy his peace and accept a conditional release. It would be unsafe for him to do so. And this it seems to me is contrary to public policy."

In summary, the courts have interpreted the section to mean that it was the intent of the Legislature to afford more than a remedy to a joint tort feasor. They went as far as to say that it was the intent by the section to create in the defendant sued a

real right; this right having been created he could force another under Section 193 (2) to come into the action in order that he might not be foreclosed of this right. The Court of Appeals interprets the section, in my opinion, to mean that after the prerequisites are met as stated in the section, then relife is afforded a defendant; that he has a mere procedural right against this fellow tort feasor for contribution which was not allowed before the passage of the act.

It is submitted that the language of the Price case and the Deuscher case overrules the Haines case, and that it was error for the Court in the instant or Schenk case to base its result on the precedent set by the Haines case, and in conclusion that it was not the intent of the Legislature to give to the Supreme Court power to implead an unsued joint tort feasor as an additional defendant under Section 193 (2) and 211-A on the motion of the original defendant, his fellow tort feasor.

J. R. N.

INTERFERENCE WITH THE RIGHT TO CONTRACT

How far can a person go in interfering with the business of his neighbor before he becomes liable for the damage caused thereby The quesion is as old as it is interesting. The answer must in every case be the result of a consideration of the parties' rights on the one hand and the requisites of public policy on the other. That persons must suffer damage for which there is no legal redress is the natural result of the common struggle for existence. On this proposition reasonable men do not differ. The equitable doctrine to the contrary notwithstanding, it is the common experience of man that there are wrongs without remedies - wrongs inflicted due to the pursuit by others of their own interests. But somewhere along the line the damaged party acquires a remedy. There comes a time when the damage to which he must submit becomes a wrong for which he may be compensated.

The Appellate Division, First Department, has recently handed down a decision which was certainly reached by a consideration of this general subject, although O'Malley, J., speaking for a unanimous court, called the principle of law invoked by the plaintiff "more or less novel". The case follows:

> Plaintiff is engaged in the car advertising business. The defendant is engaged in a similar business. Plaintiff's cause of action was predicated on the wrongful prevention of an award of an advertising contract. It seems that the Boston Elevated Railway Company solicited bids for the exclusive business of placing advertising in its cars, motor buses, and stations. The contract then expring was held by the defendant. Plaintiff offered in evidence a letter written to the railway company by defendant, containing a charge that the plaintiff had lost every advertising privilege it had ever possessed, and that the plaintiff is now running the advertising privileges in a small steam railroad. Plaintiff's evidence showed that it was successful in its other business ventures, and, instead of having the business of a small steam railroad, it had the privileges of the Pennsylvania Railroad. Plaintiff offered other evidence to the effect that bids submitted by companies other than the plaintiff and defendant were sham bids and that the companies presenting them were controlled by defendant. Plaintiff offered to show further that defendant falsely represented plaintiff to the awarding Board of Trustees, and that the defendant persuaded the Board to induce plaintiff to withdraw its bid. The Appellate Division, reversing the trial court, held that the plaintiff had made out a prima facie case. (Union Car Advertising Co., Inc. v. Collier, 232 A.D. 591).

To quote the Court, "It seems clear that the third cause of action as alleged is well founded upon a theory of unfair competition. Just as a business man who occupies a fiduciary relation with another 'is held to something stricter than the morals of the market place' (Meinhard v. Salmon, 249 N.Y. 458, 464) so the same

business man though not occupying a fiduciary relationship, may not, within the law, when engaged in ordinary business transactions, with another, and dealing at arm's length, descend below the morals of the market place."

There was cited no New York case except Meinhard v. Salmon, (supra) and that case only in support of the general principle of fair dealing there so tersely set forth by Chief Justice Cardozo. The authority mainly relied on is Lewis v. Bloede, (202 Fed. 7) from which the Court quoted at length. It appeared in that case that both parties had submitted competitive bids to furnish a certain grade of ink to the Bureau of Engraving and Printing. The inkmaker of the Bureau gave plaintiff's sample the highest rating and reported that its price was lowest. It was stated publicly to the plaintiff that he would be awarded the contract. It was held that the plaintiff made out a good cause of action in alleging that the defendant wrongfully induced the inkmaker to deprive plaintiff of the contract. Connon, J., here answered his own question in the affirmative: Does the right to enter into or make a contract come within the definition of a legal right, the wrongful interference with which is actionable?

Of course this particular action, that is, damages for the prevention of the making of a contract, is but one step removed from one based on damages for the interference of an existing one, "requiring" as is said in the Lewis case, "another link in the process of proof." The link presumably is that of establishing that the contract would have been entered into but for the interference of the defendant. But the actions are so similar that the reasons in support of one will assuredly uphold the other. In an English case, Temperton v. Russell, (1 Q.B. 715-28), it was set up that there is a distinction between inducing a breach of a contract already entered into and inducing persons not to enter into contracts, but this contention was not accepted by the Court, which ruled that the same wrongful intent existed in both cases and the same sort of injury to the plaintiff. The American and English Encyclopedia of Law has this to say, "According to some authorities an actionable interference with contract relations is not confined to cases where the contract is binding and valid. It is actionable likewise to maliciously induce the termination of a contract terminable at will or to prevent the formation of contracts which in the natural course, and but for the interference would have been formed." (Vol. 16, 1114)

One other case cited in support of the decision in Union Car Advertising Company v. Collier should be mentioned. In this case plaintiff was a real estate broker and had interested a third part- in the purchase of a vineyard. It was held that the defendant must answer in damages for having prevented the sale by intimidation and coercion. (Krigbaum v. Sharboro, 23 Cal. App. 427)

The reports abound in cases which, while not being similar in fact, nevertheless uphold the general doctrine which must lie back of the decisions in the instant case. (See Evenson v. Spaulding, 150 Fed. 517; Willner v. Silvermann, 109 Md. 341; Lubricating Oil Co. v. Standard Oil Co., 91 Hun 489; Dunshee v. Standard Oil Co., 126 N.W. (Ia.) 342; Huskie v. Griffin, 75 N.H. 345.) In the

In the last case cited it was said, "One may not interfere with his neighbor's open market or reasonable expectancies solely for the purpose of doing harm." Any case where the plaintiff alleges a wrong done him by the defendant acting not in relation to the plaintiff (except by way, perhaps, of motive or intent) but in relation to some third party must of necessity shed some light on the general subject represented by the question with which this paper opened. For example, in the instant case, defendant negotiated not with the plaintiff but with third parties, the Boston Elevated Railway Company and the Board of Trustees who were to award the contract. In the Lewis case defendant dealt with the ink-maker in whose power it was to award the contract. And so on. It is equally true that some cases where defendant has used his property to plaintiff's damage are likewise instructive on this point. A widely cited case typical of this class (latter) is (Keeble v. Hickeringill, 11 East 574). Its facts are as simple as its opinion is convincing and authoritative. Plaintiff had a decoy pond which he used to catch wild ducks. Defendant, solely to hurt plaintiff by scaring away the ducks, continuously shot off a gun on his own land. It was held that plaintiff could have damages for the injury caused thereby. This case stands out, not only for the author of its opinion, the famous Sir John Holt, but also for the part it played in two cases which were to follow. The first of these was Allen v. Flood, (App. Cas. 1-1898), which involved labor disputes. Here the question was squarely presented: Is it actionable for one man to induce another to terminate a contract which is subject to termination at pleasure, to induce in other words, a lawful, and not an unlawful act, merely because the inducement is coupled with an intent to injure. The Keeble case was relied on by the plaintiff. Of the twenty-one judges who considered the case in three stages, thirteen sided with the plaintiff, but the House of Lords sided six to three for the defendant. The majority opinion held that an intent to injure could not make an act, otherwise legal, illegal. The Keeble case was disposed of by Lord Mac Naghten who said, "There is not much help to be found in the earlier cases, not even the great case about frightening ducks in a decoy, whatever the true explanation of that case may be."

Three years later appeared Quinn v. Leatnem, (App. Cas. 495-1901) where the defendant was held liable for wrongfully and maliciously inducing customers and servants to cease to deal with the plaintiff. Allen v. Flood (supra) was neither followed nor successfully distinguished. There now remains no doubt that the Keeble and Quinn cases are the better law. Allen v. Flood, as an authority was rendered ineffectual by the decision in the latter case. (Nims on Unfair Competition and Trade Marks, Chap. 12, and cases there cited; Harvard Law Review, vol. 18, 411)

Practically all the cases in one way or another deal with malice. The term cannot be disregarded in any review of the subject. In the instant case the court voiced the opinion that "it is unfair competition not to be countenanced by a court of law for a business man wantonly or maliciously without provocation to interfere with another man's business". (p. 594) Perhaps no term is more loosely and at the same time more frequently used. The law which controls its relevancy in any particular case is

anything but settled. However, the authorities generally agree that it is often employed in cases such as are here under discussion to mean the intentional doing of a wrongful act without just cause or excuse. Certainly in the Keeble case malice controled. No one will doubt that the defendant would have been guilty of no wrong had his shooting been the lawful prosecution of his own interests. That is, had he chose to shoot ducks on his own land, plaintiff would have suffered no actionable wrong. Another interesting case where malice alone seemed to control is Tuttle v. Buck, (107 Minn. 145). There the defendant had to answer in damages for having set up a rival barber shop for the sole purpose of ruining the plaintiff. It was held that although the defendant engaged in a perfectly lawful enterprise he could not do so solely to injure the plaintiff. Langauge used in American Bank and Trust Co. v. Federal Reserve Bank of Atlanta, (256 U.S. 350) by Holmes, J, would seem to indicate that such is the opinion of the United States Supreme Court. The distinguished jurist spoke of "disinterested malevolence" which has been interpreted to mean that a lawful act to become the basis of a suit for damages must have been engaged in with an eye single to hurting the plaintiff and for no other legitimate purpose. A similar view may be attributed to the New York Court of Appeals from the report of Beardsley v. Kilmer (236 N.Y. 80), by noting that Judge McLaughlin, who concurred in result only, held that an act which the law says one has a legal right to do does not become wrongful or actionable no matter what the motive may be.

Nims in his classic text on this whole field of the law suggests that malice, or what is called malice by some, is nothing more than a determination of men to succeed, "to down rivals, to get out of their way those who block their progress". (p. 443) This takes us back to the kind of malice referred to above, that is, the intentional doing of a wrongful act without just cause or excuse. These two sentiments may be combined by saying that the intentional downing of rivals without just cause or excuse is wrongful.

Although, as noted above, the court in upholding the cause of action in the instant case cited no New York authority, the decision seems to follow the general trend in this state as to liability for interference in general. In this connection the old English case of Lumley v. Gye, (2 E & B 216 - 1853) should be referred to before some of the New York cases. There it appeared plaintiff had a contract with an opera singer whereby the latter was to sing at the plaintiff's theater. Defendant, without using fraud, induced the singer to refuse to perform for the plaintiff. Plaintiff's rights were protected by injunction. "The contract was wholly executory and could not be placed under the familiar category of enticing away servants, but the case may be regarded as a starting point of the development of the law which has now resulted in the establishment of the broad rule." (Nims, supra, p. 458) Nineteen years later the case of Ashley v. Dixon (48 N.Y. 430) came up in this state. It was there held that a third person may induce another to break a contract if not guilty of fraud or misrepresentation. Refusing to accept the authority of Lumley v. Gye,

the New York courts generally followed Ashley v. Dixson down to 1913 when the second department of the Appellate Division held that to induce the violation of a contract though by mere persuasion ordinarily is actionable. (Warschuser v. Brooklyn Furniture Co., 159 A.D. 81). The case of Posner v. Jackson, (223 N.Y. 325) in 1918 is generally considered the turning point in New York. The court there laid down this rule, "If a person knowingly and intentionally interferes with the express contract rights of an employer with his employee and the purpose and intent of such interference is to injure such employer and it does result in injury an action will be sustained to cover damages therefor." p. 332. This was followed in Lamb v. Cheney, (227 N.Y. 418). It was in this case that malice was liberally defined as "the intentional doing of a wrongful act without just cause or excuse." It is now settled that actual fraud does not have to be present to hold liable an interfering party. The law on this general proposition is now the same in New York as in England and elsewhere. (Nims, supra, and cases there cited)

The decision in Union Car Advertising Co., Inc. v. Collier seems to be a logical and desirable furtherance of the prevailing rules as to liability for unlawful and unfair competition now generally recognized. Whether the Court of Appeals would concur must at this time be a matter of speculation. An opinion from it in this case would be valuable.

H. S. V. S.

CURRENT DECISIONS

* * *

TORTS - PARKING IN HIGHWAY NUISANCE TO ABUTTING OWNERS

Action to restrain defendant from parking automobile in street in front of plaintiff's residence in Rochester. Defendant's conduct is interference with plaintiff's easement of access to his residence and constitutes private nuisance. (Decker v. Goddard, (233 A.D. 139).

That "No one can make a stable of the King's highway" was decided in Rex v. Cross (3 Campb. 224) by Lord Ellenborough. A number of cases in this state have impliedly decided the same thing. Notable among these decisions was Cohen v. Mayor of New York City (113 N.Y. 532). In that case the Court of Appeals decided that it was a nuisance to continuously store a wagon in the street even though the owner was authorized to do by the city. The thills of the wagon were tied up by a slight string which broke when the wagon was hit by a passing coal wagon. The falling of the thills killed the plaintiff's intestate who was a pedestrian on the sidewalk. The court said, "The storing of the wagon in the highway was a nuisance. The primary use of the highway is for the purpose of permitting the passing and repassing of the public, and it is entitled to the unobstructed and uniterrupted use of the entire width of the highway for that purpose; under temporary exceptions as to deposits for builting purposes, and to load and unload wagons, and receive and take away property, for, or in the interest of the owner of adjoining premises which it is not now necessary to more specifically enumerate." (At p. 535).

Further, at page 536, "If it be permanently or even habitually in the highway, it is a nuisance."

An abutting owner of realty has certain rights, or easements, due to his abutting ownership. He has a right of access and egress, of light and air, and a right to an unobstructed view of the events happening in the highway. That he has a right to get on to the highway from his property can hardly be doubted; that he has a right to unobstructed light and air was decided in the numerous Elevated Railway cases.

Under the claim that he was one of the travelling public with the consequent right to stop at the curb, the defendant in Decker v. Goddard (supra) insisted on parking his car for hours at a time in front of the plaintiff's residence. Despite requests to park elsewhere, made by the plaintiff, the defendant continued the practice until the plaintiff was forced to seek his remedy in the courts. The defendant sought to justify himself both under the theory of a temporary stop and also by his construction of certain ordinances of the City of Rochester. By Section 3, Article 1 of the Ordinance, parking is defined as "permitting a vehicle to stand in a street longer than necessary to receive or discharge passengers, or load or unload merchandise." The pertinent part

of Section 40, Article 5, says, "Vehicles shall.....not park on any street at any time for more than six hours except as otherwise hereinafter designated by ordinances or by order of the Commissioner of Public Safety." No other regulation was shown. Under the last mentioned ordinance, defendant claimed a right to park for six consecutive hours in any residential section. The Trial Court refused the injunction but this was reversed and the injunction granted by the Appellate Division, Fourth Department.

The Court said, "A statute or ordinance granting the privilege of thus stowing an automobile formany hours in front of a private residence would be clearly in derogation of the common-law right of the resident. Wherefore, its permissive character must appear clearly; must be explicit but tacit." The ordinance quoted merely settled the rights of a motorist as to the city. It did not extend a privilege; it merely announced a prohibition.

In an analagous case, Lowell v. Pendleton Auto Company, (123 Oregon 383), the defendant was restrained from parking and repairing autos in front of the plaintiff's house. There the Court said: "We do not believe that the parking ordinances of Pendleton (which permitted unlimited parking along Johnson Street, on which the plaintiff resided) were intended to convert the streets into repair shops and storage spaces disregardful of the protests of the abutter."

In my opinion, the dual rights - of the public to the unobstructed use of a highway dedicated to travel; and of the abutting owner to the use of his easement of access - were vindicated by the one injunction granted plaintiff Decker to enjoin the continuous parking by defendant Goddard in front of the plaintiff's private residence.

J. E. W.

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CONSTITUTIONAL LAW GASOLINE TAX INTERSTATE COMMERCE

Suit in equity to restrain enforcement of a state law imposing tax on gasoline used by plaintiff in its operation of an air line in interstate commerce, in connection with the use of the airports at Cheyenne and Rock Springs, Wyoming. The statute required each wholesaler engaged in the sale of gasoline to pay the license tax of four cents per gallon and the State Treasurer to pay over all funds received from gasoline used at any municipal air field to the city or town where such air field was located, to be used for the maintenance and improvement of such field. Plaintiff contends statute is unconstitutional as applied to interstate commerce in that it is in direct contravention of the commerce clause of the Constitution. The court upheld the statute, resting its decision on the provision relating to the application of the proceeds of the tax. (Boeing Air Transport v.

Edelman, 51 Fed. Rep. 2d Series, 130).

This is the first decision to uphold the constitutionality of a state statute imposing a tax on gasoline used by aircraft engaged in interstate commerce. Similar statutes which have been held unconstitutional by previous cases had applied the entire fund received from the tax to the maintenance of roads, distinguishing these from the statute in question. (U.S. Airways v. Shaw, 43 Fed. (2d) 148; Mid-Continent Air Express Corp. v. Lujan, 47 Fed. (2d) 266).

The theory of this case is very logical. "If the method of doing interstate business necessarily imposes duties and liabilities upon a municipality, it may not be charged with the cost of these without just compensation. Even interstate business must pay its way." (Postal Telegraph-Cable Co. v. City of Richmond, 249 U.S. 252). This theory has been applied in motor vehicle cases where the proceeds of the tax were used for the maintenance of the highways and the enforcement of the laws governing the use of the same. (Kane v. State of New Jersey, 242 U.S. 160; Hendrick v. Maryland, 235 U.S. 610; Clark v. Poor, 274 U.S. 554). Similarly state inspection laws have been upheld. (Patepsco Guano Co. v. Board of Agriculture, 171 U.S. 345) and municipal ordinances imposing on telegraph companies, though engaged in interstate commerce, a tax to defray the expense incident to the inspection of poles and wires. (Western Union Telegraph Co. v. New Hope, 187 U.S. 419).

However, as the charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for the expenses incurred by, and not for the privilege of transacting, such commerce. (Interstate Transit Co. v. Dick Lindsey, 283 U.S. 183).

There are thirteen states having statutes which apply the proceeds of the tax on gasoline used by motor vehicles and aircraft alike to the maintenance of roads. Their constitutionality has not been tested, but obviously, if this case is followed, they will be declared unconstitutional as regards interstate air transportation. New York State refunds the tax on gasoline used by aircraft engaged in interstate commerce. However, municipalities in this state, in connection with municipal airports, tax gasoline sold in such airports for expenses in connection therewith. Nevertheless, there has been some protest upon the assertion that it is an unlawful burden on interstate commerce. (1930 U.S. Av. R. 514 at 523). As yet there has been no adjudication in this state upon the subject.

H. A. L.

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NEGLIGENT MANUFACTURE OF ARTICLE INHERENTLY DANGEROUS

> The young woman who brings this action was employed at a roadside stand. While engaged in the performance of her duties she was strudk in the eye by a piece of glass thrown by the explosion of a bottle of carbonated cream soda recently placed in a container of ice. Her sight was destroyed and she sues both the bottler of the beverage, Minck Bros. and Co., and the manufacturer of the bottle, Peerless Glass Co., on the theory of negligence. Negligence on the part of both defendants was found and the plaintiff secured judgment against both. The negligence of the Peerless Glass Co. consisted in manufacturing and selling a bottle containing a structural imperfection which would cause it to explode when subjected to an internal pressure of 35 pounds per square inch and a sudden change in temperature, which conditions, as defendant knew, would frequently occur in the customary use of the bottle. The negligence of Minck Bros. and Co. consisted in repeatedly filling such bottle, knowing the conditions of its use, without adequate inspection to discover the defect. (Smith v. Peerless Glass Co., Inc., 233 A. D. 252)

With this decision the legal doctrine inaugurated in this State in 1852 by the famous case of Thomas v. Winchester, (6 N.Y. 397) reaches its culmination. It is, of course, a fundamental principle of the common law that the manufacturer of any article under a contract is not liable to a third person who uses it, for injuries resulting from a defect therein. The manufacturer is liable for negligent construction only to the person with whom he contracted. In Thomas v. Winchester the court departed from this general rule in order to hold liable a defendant who had bottled belladona under an extract of dandelion label and sold it to a druggist, who in turn sold it to the plaintiff, who administered the drug in reliance upon the label. The principle established by this decision recognized that the manufacturer of an article inherently dangerous to life is liable to third persons for injuries arising from a negligent defect therein. This liability does not rest on any contract or direct privity between the manufacturer and the injured party, but on the duty which the law imposes on everyone to avoid acts in their nature dangerous to the lives of others.

Thirty years later this new doctrine was broadened to include articles not inherently dangerous to life, articles which become dangerous simply by reason of the defect on which negligence is premised. In the case of Devlin v. Smith, (189 N.Y. 470), the builder of a scaffold was held liable to a workman injured when the scaffold broke. From this decision emerged the doctrine as we know it today. The manufacturer of an article which is of such a nature that defective construction will make it imminently dangerous to human life and limb when put to customary and reasonable use is liable for any injury resulting from such defect, provided he knows that in the usual course of events the danger will be shared by others than the immediate buyer. (Heaven v. Pender, L.R. 11 Q.B.D. 503; Statler v. Ray Manufacturing Co., 195 N.Y. 478; MacPherson v.

Buick Motor Co., 217 N.Y. 382).

The last word from the Court of Appeals on this subject is to be found in Judge Cardozo's opinion in MacPherson v. Buick Motor Co., (supra). There the plaintiff had purchased an automobile from a retail dealer to whom the defendant manufacturer had sold it. While the plaintiff was operating the car, a wheel collapsed and the defendant was held liable for the resulting injury. As a matter of fact the wheel had not been manufactured by the defendant, but was bought by it from another manufacturer. On this point the opinion states:

> "We are now dealing with the liability of the manufacturer of the finished product, who puts it on the market to be used without further inspection by his customers.... We are not required at this time to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the finished parts. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that in those circumstances the negligence of the earlier memebers of the series is too remote to constitute, as to the ultimate user, an actionable wrong.... We leave that question open. We shall have to deal with it when it arises." (At p. 390).

Smith v. Peerless Glass Co. in a measure presents the question left open by the MacPherson case. The glass company is the manufacturer of a constituent part of the finished product. Between its negligent act and the injury to the plaintiff intervenes the duty of inspection imposed upon the manufacturer of the finished product. The liability of the bottler, Minck Bros. and Co., is undoubted. The question of the liability of the glass company is really one of proximate cause. Was the negligent act of this defendant too far removed from the plaintiff's injury? Did a new force, such as the use and deterioration of the bottle or the bottling company's failure to inspect it, enter the chain of causation so as to make defendant's negligence a remote cause of the injury? Here is the conclusion of the court:

> "It does not appear that this defendant (Peerless Glass Co.) relied on tests to be made by the bottler; even if it did, inadequate tests by the latter would not absolve it from the consequences of its own breach of duty. We think that the direct chain of causation remained unbroken by any new and direct intervention;.., and that there is not such an element of remoteness that this defendant may be exonerated from liability."

> "The original negligence carried the potency of peril, without warning, to the feet of this plaintiff." (At p. 257)

A. H. P.

NEGLIGENT PERFORMANCE OF CONTRACT - INNKEEPER'S LIABILITY FOR GOODS NOT BROUGHT INFRA HOSPITIUM

Plaintiff, being a guest at the defendant's hotel, delivered to an employee thereof a trunk check with instructions to "get the trunk in" promptly from the railroad station. The check was in turn deposited with a licensed expressman, with the same instructions, who directed his truckman to obtain and deliver the trunk. En route from the railroad station, the latter was required to pick up a trunk at another hotel, and while thus engaged, leaving the truck unattended with the ignition key in the lock, the truck, together with the plaintiff's trunk, was stolen. Itwas for the loss thereof, with contents, that plaintiff sued and recovered. Judgment for the plaintiff was affirmed in the Appellate Division on the theory of defendant's absolute liability as an innkeeper. The Court of Appeals, however, "preferred" to affirm on the theory of the negligent performance of a contract by defendant, through its intermediate agents, and expressly left open the question of defendant's liability for the breach of a duty owed by an innkeeper to his guest. (Davidson v. The Madison Corporation, 257 N.Y. 120).

This case is important, not for what it did decide, but for what it did not decide. In the acts of the parties to this action, the court was able to spell out a contract, for the negligent performance of which, the plaintiff has recovered a considerable judgment. It was shown on the trial that the defendant maintained a system for the transportation of baggage, for which it made a charge; that the plaintiff availed herself of this service; and that defendant accepted the order and undertook to perform the service. The legal result was that for a valuable consideration the defendant bound itself to secure plaintiff's baggage for her, using at least ordinary care in the fulfillment of the promise. In the performance of that duty, the defendant was privileged to act through an independent contractor, but in so-doing, it could not escape liability for its non-performance through the negligence of one to whom the contract duty was assigned. "The performance in such a case is indeed in legal contemplation rendered by the original obligor, who is still the party liable if the performance is in any respect incorrect." (1 Williston on Contracts, Sec. 411).

The evidence in the case being sufficient to warrant a finding of negligence on the part of the truckman in leaving his truck unattended, with the ignition key in the lock, the defendant's consequent liability was established, and thereon rested the affirmance of the judgment by the Court of Appeals.

The legal principles above enumerated are not new, but the facts of the case giwe rise to an interesting and troublesome question. Just when does an innkeeper's liability in respect to the baggage of his guest attach? It was this question which the Court briefly noted, but did not answer.

At common law an innkeeper was an insurer of the goods of his guests brought within the precincts of the inn, or infra hospitium. Liability did not extend to cover property not within the four walls of the inn. But this strict doctrine has been shaken in some jurisdictions, and an innkeeper has been held liable in instances where he has not actually received the baggage from the guest, such liability being predicated upon the delivery of a baggage or transfer check, as in the instant case. (Williams v. Moore, 69 Ill. App. 618; Coskery v. Nagle, 83 Ga. 696; Hagerstrom v. Brainard Hotel Corp., 45 Fed. Rep. (2d) 130). The New York Court of Appeals is not "impressed with the reasoning in these cases." "Clearly", it was said, "the delivery of a railroad check to an innkeeper is not a symbolical delivery of the baggage which it represents." (Davidson, etc., supra, at p. 123).

Conceivably, instances may arise where in the interests of absolute justice, the rule must necessarily be relaxed, but the case would depend upon its own facts. Certainly, as the court points out in the Davidson case, where an innkeeper never has custody or possession of the things of his guest, and never assumes a relationship in the least degree resembling that of a bailee, it is difficult to see how the duty of an innkeeper to safeguard and defend the possession of his guest can arise.

While the court did not determine that the defendant was or was not liable for the breach of a duty owed by an innkeeper to his guest, the opinion of the court, through Judge Kellogg, contains very convincing dicta, which inclines one to the view that should the case come up, it would be held that the delivery of a baggage check did not of itself constitute the innkeeper an insurer of the safety of the baggage, which it represents.

W. L. B.

* * * * * * * * * *

TORTS - LIABILITY TO GUEST FOR MECHANICAL DEFECT IN MOTOR VEHICLE

An owner of an automobile is not liable for injury to a guest passenger occasioned through a mechanical defect in the car although by inspection he might have discovered the fault.

The salient feature of this principle of law is the absence of any liability even though the one who gives the invitation fails to make a reasonable inspection of the vehicle, which failure is the cause of the accident. A casual perusal might lead one to proclaim it a vicious and unfair rule of law.

In Higgins v. Mason (255 N.Y. 104) the Court of Appeals sustains the above legal principle. Mr. Mason invited Mr. and Mrs. Higgins on an automobile trip. For 100 miles of the trip the car behaved normally. While plaintiff was driving, the car suddenly

swerved from the right to the left side of the road, ran into a ditch, overturned, and caused the death of Mr. Higgins. The cause of the accident was a broken "spindle pin" which permitted the front wheel to fall away from the stationary axle. Mr. Mason did not know of defect in the "spindle pin". The theory of the plaintiff's action is negligence.

To facilitate the explanation, negligence will be divided into two classes, firstly, malfeasance or "active negligence", as driving carelessly; secondly, non-feasance or "passive negligence", which is grounded in an omission.

Massachusetts and Georgia hold that a host is liable to a guest passenger where gross negligence is found. (Masselette v. Fitsroy, 288 Mass. 487; Epps v. Parish, 26 Ga. App. 399); and New Jersey only where the host has been guilty of willful negligence. (Faggioni v. Weiss, 99 N.J.L. 157). In New York and most other states the rule is that an owner of an automobile owes to a guest the duty of "ordinary care", "not to increase the danger of the guest while thus in defendant's car or to create any new danger." (Clark v. Traver, 205 A.D. 206; 237 N.Y. 544) - a rule truly most lenient to the guest. But it must be noted that this duty of "ordinary care" relates only to the care to be given in the operation of the car. Active negligence in the operation of the car alone is a breach of this exacting measure of responsibility.

The rule of "ordinary care" does not apply to that "passive negligence" illustrated by a failure to detect mechanical defects, even though they would be disclosed by a reasonably careful inspection periodically. As between host and invitee, the former is taxed with no duty of inspection, hence no liability for such an omission. In Patnode v. Foote (153 A.D. 494) the duty of a host was stated thus, "one who invites another to ride is not bound to furnish a sound vehicle". The guest on entering the automobile takes it as it is, and accepts the dangers incident to that particular mode of conveyance. A helpful analogy is the relation of landowner and licensee. The former does not warrant the reasonable safety of the premises. In accepting an invitation to his host's premises, for purposes of entertainment, (as distinguished from business or commercial purpose) or an invitation to drive, the guest accepts the premises or the vehicle as they are. The rule in either instance is subject to the proviso that such owner does not fail in the duty of warning the guest of that which is a concealed defect or by no act of his creates a new danger. The guest "cannot hold the owner or occupant to any duty of care beyond giving notice of any danger of which he is aware." (Bigelow on Torts, 8th Ed. p. 161). "If he should have knowledge that the vehicle was unfit for transportation, he might be liable for recklessly inducing another to enter upon danger." (Patnode v. Weiss, supra)

The defendant host, Mason, was not liable for the death of his guest because of a mechanical defect in his car, although Mason, by inspection, might have discovered the fault, since Higgins, in accepting the invitation to ride, must have taken the car as he found it. No duty of inspection rested on Mason. Mason

would be liable only if he;

1. knew of the dangerous condition;
2. realized that it involved an unreasonable risk;
3. believed that the guest would not discover the condition; and,
4. failed to warn him of the condition and risk involved.

G. M. S.

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COMPETENCY OF EVIDENCE OF CRIME IN CIVIL ACTIONS

A recent decision of the Federal Circuit Court of Appeals for the Seventh Circuit presents for discussion the question of the admissibility of criminal convictions in civil actions. (Diamond v. New York Life Insurance Co., 50 Fed. (2d) 884). The problem involved in the case referred to, so far as our purposes here are concerned, centered about the admissibility of evidence of a conviction of murder, offered by the defending insurance company in an action upon one of its life policies, to prove that the insured met his death as a result of a violation of law - a fact which if proved admittedly vitiated the policy. Found guilty of the murder of his wife, the insured was electrocuted in an Indiana state prison in pursuance of the judgment, evidence of which, it was held as a matter of law, was admissible in the case at bar to establish the defense upon which the insurer relied.

The result of this is that the fact of the insured's criminality, necessarily decided in the criminal proceedings, and which fact is the basis of the defense in this civil action on the policy, was permitted to be proved in the latter by reference to the former. Yet the court coneedes it to be the general rule that a verdict or judgment in a criminal proceeding is not competent proof to establish a fact necessarily determined, in a civil action. It adds, however, that the rule has certain exceptions - within which this case purportedly falls.

The general rule stated finds support in the majority of decided cases and among text-writers, and is founded in justice as well as reason. Furnishing the basis for it is the doctrine of res judicata - a principle of universal jurisprudence forming part of the legal systems of all civilized nations. It may be said to inhere in them all as an obvious rule of expedience and justice. It is founded on the time-honroed maxims of the law that "a man should not be twice vexed by the same cause," and that "it is for the public good that there should be an end of litigation." (Note to Micks v. Mason, 11 L.R.A. (N.S.) 654). But to justify the application of the doctrine, it must appear that the parties in the subsequent action, in which the former is invoked as res judicata and determinative of the issues, are the same or in privity with them. When, then, we seek to introduce a criminal judgment as res judicata upon a fact in issue in the civil action, we are immediately met with the defense that the parties are not the same. The former is between the State and the accused; the latter between two individuals, litigating their respective civil rights. When the parties are not the same, the reason for the rule falls, and a fact determined in a criminal prosecution, therefore, ought not to prejudice a party who had no occasion or opportunity for participation in the criminal prosecution. And so the cases have held.

In an action for abduction brought by the child's mother against its father, evidence of a judgment of conviction of child stealing was not admissible. In the civil action whether or not the defendant had been convicted was not in issue. The issue on

trial was whether or not any lawful rights of the plaintiff had been invaded by reason of which she sustained damages. (Montgomery v. Crum, (Ind.), 161 N.E. 251). Similarly in an action for assault, a transcript of defendant's conviction therefor before a justice of the peace was not admissible. (Sklebar v. Downey, (Mo.) 285 S.W. 148). And in an action upon an accident insurance policy for injuries received as a result of an assault by a tenant, record of acquittal of the tenant, or if he had been convicted, record of conviction, was not admissible to establish the truth of the facts upon which it was rendered. (Myers v. Maryland Casualty Co., (Mo.), 101 S.W. 124). In an action to recover the value of goods allegedly stolen, a record of defendant's conviction for larceny was not admissible to prove the taking. (Interstate Dry Goods Store v. Williamson, (W.Va.), 112 S.E. 301). In an action for divorce, a record of acquittal of defendant of the crime of adultery, was not admissible. (Jenkins v. Jenkins, (Ore.), 153 Pac. 470). A contrary result reached in two early Maine cases, (Anderson v. Anderson, 4 Me. 100 and Randall v. Randall, 4 Me. 328) on the question of the admissibility of a conviction of adultery in an action for divorce, was thus commented upon in a note on the general subject in 11 L.R.A. (N.S.) 656: "they cannot be regarded as impairing the general rule." In a suit by a widow for the homicide of her husband, a judgment of acquittal of the defendant in a criminal prosecution for murder was not admissible. (Cottingham v. Weeks, 54 Ga. 275). In an action for false imprisonment the defendant was not permitted to introduce a conviction of plaintiff for assault. It was there said that the conviction could not be used as evidence of the facts upon which the judgment proceeded. (Wilson v. Manhattan Ry. Co., (N.Y.), 2 Misc. 127.

The reasoning in all the above mentioned cases in support of t rule of exclusion proceeds along similar lines. The parties to a criminal and civil case are different; the rules of evidence are different in the two classes of cases and the objects sought to be accomplished are essentially different. In a criminal case the defendant cannot be made to testify and no inference can be drawn from the fact that he does not testify, while in a civil action his adversary may use him as a witness if he so desires. He may, however, in a criminal case testify in his own behalf and to allow the record of that judgment to be used as evidence in the civil suit would be giving effect to the defendant's testimony, given upon the criminal trial. In a criminal case the guilt of the defendant must be established beyond all reasonable doubt, while only a preponderance is required in civil trials. A criminal trial between the State and the accused seeks vindication of a public right, while a civil suit the purpose sought is vindication of purely private rights.

It will be noted from the cases cited that an acquittal is equally inadmissible with a conviction when sought to be introduced to prove the fact upon which it was rendered. It would seem just that if a defendant would be prevented from taking advantage of a judgment of acquittal, so also should he not be prejudiced by the admission of a judgment of conviction. (Freeman on Judgments, 319). This conclusion, however, was not reached in a recent Virginia case, in which it was said, commenting upon the admissibility of a judgment of conviction of arson in an action upon a

fire insurance policy, "The rule of exclusion is to protect those who have had no opportunity to assert their defense and there seems to be no reason why the accused should not be bound by a decision adverse to him. He has had his day in court and the benefit of the most strenuous degree of proof required. It is logical that the record of an acquittal should not bind the other party since the prosecution may have failed merely to prove the guilt beyond a reasonable doubt." (Eagle, etc. Ins. Co. v. Heller, 140 S.E. 314).

This case provoked widespread comment and was the subject of discussion in the Minnesota Law Review, Vol. 13, 546; also the Virginia Law Review, Vol. 14, 398, and in the North Carolina Law Review, Vol. 6, 333. The respective writers therein agreed that the pronouncement was against the weight of authority, but in the latter it was submitted, that "reason, if not authority, favors the ultimate result reached." It is also significant that the justice in prefacing his decision said: "This is a case in which rigid adherence to a general rule and some judicial expressions would be a reproach to the administration of justice." The opinion is very exhaustive in its consideration of the authorities and while admitting they do exist seeks to overthrow the logic of them. While the final result reached may appease one's sense of abstract justice, the extensions to which it might be carried invite consideration. That the justice advocated an abrogation of the doctrine of res judicata as applied to criminal cases will not be presumed, but conjecture alone can fix the point at which he would stop. Certainly a conviction of assault, larceny, or homicide is no different from one of arson, and when such a conviction is given conclusive effect in a later civil action, as it was there, it may well be doubted whether a party's right to litigate the issues in a civil action before a jury is not being interfered with.

In English jurisdictions In re Crippen, 1 P. 108 (1911) is referred to as authority in favor of the admission of a conviction for a like purpose. That case involved a dispute between a sister of an intestate wife and the representative of the husband to be appointed administrator of the wife's estate. It was pointed out that the husband had been executed after conviction of the murder of his wife, and the judgment of conviction was admitted as presumptive proof of that fact. This rule was followed in the case of Mash v. Darley, 1 K.B. 1 (1914) wherein a conviction of the defendant for carnally knowing plaintiff was admissible as corroborative proof to establish that defendant was the putative father of a bastard child. But the weight to be given to In re Crippen upon the point in issue may be doubted, as it is pointed out in the Harvard Law Review, Vol. 35, 440, wherein it is stated: "A conviction for murder is not admissible in a proceeding to deprive the murderer of the property inherited from his victim, although it is admissible to affect the appointment of an administrator of the victim's estate, since the court then has discretionary powers to consider general unfitness and is not adjudicating rights."

In Black on Judgments, Vol. 2, Sec. 539 the general rule with its exception is stated thus: "Judgment in a criminal case cannot be used by way of estoppel in a civil action save for the

single purpose of proving its own existence if that becomes a relevant fact." It is similarly stated in 1 Greenleaf Evid. 537; Underhill on Evidence, Sec. 156; and Freeman on Judgments, Vol. 2, Sec. 653. In a note on the subject in 11 L.R.A. (N.S.) 653, it is said, "General rule is that a judgment in a criminal prosecution is no bar to a subsequent civil action arising from the same transaction and that a record in a criminal prosecution is not competent evidence in the civil action save for the single purpose of proving its own existence, if that becomes a relevant fact, in which case not only is it admissible, but it is conclusive for the purpose of establishing the fact that it has been rendered." In an exhaustive consideration of many cases in Green v. Altenkirch, 176 A.D. 330, the general rule with its exception was reiterated.

As illustrative of the exception referred to - in an action for malicious prosecution, verdict of acquittal of plaintiff (def. below) is admissible to establish that fact. It is not admissible to prove defendant's innocence of the crime charged. (Western Union Tel. Co. v. Thomasson, 251 Fed. 833; Wilson v. Vassar, 108 So. 250). A former conviction is admissible where the fact that a defendant has been previously convicted of crime becomes material in fixing the grade of the subsequent crime; or when by law the fact of conviction disqualifies a witness, the record may be introduced for that purpose and is unimpeachable. That a judgment is admissible to establish the fact of its own rendition is also the English rule. (1 Starkie, Evid. 278; Pope v. Foster, 100 E. Rpnt. 1192).

A still further exception to the general rule, though apparently not noted by the text-writers, is said to necessarily exist where the criminal judgment is the foundation of the civil suit. (11 L.R.A. (N.S.) 662). In an action to recover a reward for detection and conviction of an offender, the record was admissible to prove that fact, but not to prove guilt. (York v. Forscht, 23 Pa. 391; Brown v. Bradlee, (Mass.) 30 N.E. 85). A judgment of a criminal court convicting one of maintaining a gambling house in violation of law and condemning him to pay a fine of $1000 to the charity hospital as provided by statute in such cases, was admissible in a contest between the hospital and the parish, as to which is entitled to the fine. (Orleans Parish v. Morgan, (La.) 6 Mart. N.S. 3).

It is to this class of exceptions which the case in issue, (Diamond, etc., supra) is allocated, and quoted in the case as controlling authority for the result reached was Burt v. Union Central Life Insurance Co., 187 U.S. 362. A lengthy consideration of the Burt case would seem justified since the question of law there presented and disposed of is identical with that in the Diamond case, and any comment is equally applicable to both. The action was upon a life insurance policy, the insured having been electrocuted pursuant to a conviction of murder. The court held that the insured's death was the result of a self-destruction and that public policy forbade a recovery under such circumstances; but conclusive effect was given to the judgment of conviction admitted in the action. The stress of the plaintiff's contention was that they were not parties to the conviction and that therefore it was inadmissible to prove that the insured did murder his wife and thus bring on his own death at the hands of the law. The court

said: "If the case turned on the applicability of the principle of res judicata there would be little difficulty in reaching a conclusion. There is no identity of parties, nor are the two parties to this action privies to those in the criminal proceeding. A judgment in a criminal prosecution for assault and battery cannot be invoked as res judicata in a civil action by the party injured to recover damages. But there the two actions run along parallel lines, and the relief sought in each is the direct and natural result of the wrong complained of. Here the civil action is founded upon the result of the other - cannot be maintained but for the fact of that result. If the insured had been acquitted there would have been no cause of action on the policy."

Granted that there may be such other exception to the general rule as referred to above, it is difficult to see that this case comes within it. It is submitted that the present action is not founded upon the result of the other action. The result of the other action was a judgment finding the insured guilty of murder. This action is predicated upon the death of the insured. That death occurred as the result of a violation of law may admittedly prevent a recovery on the policy, but the medium of proof of a violation of law cannot, without upsetting the settled principles of res judicata, be the evidence of the conviction of murder. If the insured had been acquitted obviously there would have been no cause of action on the policy, because the risk accepted would not then have matured. But this does not furnish justification for the admission of the conviction.

The reason for the result reached may be ascribed to a consideration of public interests due to the practical impossibility of reassembling witnesses and producing anew the evidence upon which the conviction was secured, and which established a violation of law by the insured. But if that is the reason, it would seem desirable that judicial legislation be not indulged in but that the exercise of the power of law-making be left to that body in which it rightfully rests.

A consideration of a few other cases on the subject would seem to warrant the position of dissent taken. In an action on an insurance policy to be voided if insured should die in the known violation of law, the record of acquittal of the person who killed the insured was incompetent to prove that the condition was broken. (Cluff v. Mutual Benefit Life Ins. Co., 99 Mass. 317). In a similar action on a policy which prevented recovery if insured's death resulted from "intentional injuries inflicted by insured or any other person" a record of conviction of the insured's killer was not admissible to controvert plaintiff's claim that the killer was insane and that therefore the insured did not meet death from 'intentional' injuries. (Marceau v. Travelers Ins. Co., (Calif.), 35 Pac. 856). A judgment of conviction of the beneficiary for the murder of the insured was not admissible in an action by her to recover on the policy. (Lillie v. Modern Woodmen of America, (Nebr.), 130 N.W. 1004). Likewise a record of acquittal of a person accused of murdering the insured, on the theory of self-defense, was not admissible to show insured met death from a violation of law. (Sovereign Camp of Woodmen of the World v. Purdom, (Ky.), 143 S.W. 1021).

One further exception is recognized, which might better be referred to as an instance where the general rule is not applicable, because it is founded upon entirely different principles. A judgment of conviction on an indictment to which defendant has pleaded guilty, may be admitted as prima facie proof of guilt. In such cases, however, the record is admitted not as a judgment establishing the fact, but as the deliberate declaration or admission of the party himself that the fact is so. It is admitted as a solemn confession of the very matter charged in the civil action. This rule is in general favor among the text-writers, and the reported decisions in support are numerous. (Mead v. Boston, 57 Mass. 404; Bradley v. Bradley, 11 Me. 367; Green v. Bedell, 48 N.H. 546; Clark v. Irvin, 9 Ohio 131; Spain v. Oregon-Washington R. & Nav. Co., 153 Pac. 470).

By statute, also in most states, convictions of felonies in the case of attorneys are admissible and conclusive in disbarment proceedings. In New York disbarment is mandatory on the Appellate Division in case of felony, and a record of conviction is the appropriate means of proving it. (Judiciary Law, Sec. 88, Subdiv. 3). But for the statute, it would seem that the general rule would render the conviction inadmissible.

That the Federal courts will in the future accept the Burt and Diamond cases as authoritative can not be doubted. In the opinion of the writer, however, this result is unfortunate, but a firm belief is entertained that subsequent decisions emanating from state courts will not mark a similar departure from the hitherto unshaken doctrine of res judicata.

W. L. B.

* * * *

TITLE TO LAND UNDER LAKES

Academic as the question appears at first glance, title to the beds of lakes in this state is often of great practical importance. If the bed of a lake is the subject of private ownership, one may commit the tort of trespass by fishing, shooting, bathing, or swimming on its waters. (17 Johns. 195; 20 Johns. 90; 75 Hun 472; 91 N.Y. 98; 175 A.D. 153). The right to take ice from a lake (43 A.D. 215), title to ore and soil under a lake (233 U.S. 60), the ownership of newly formed islands (47 N.E. 72), and the right to erect dams and other structures (46 N.Y. 511) follows ownership of the bed thereof. Thus, the determination of important personal rights and of valuable property rights not infrequently depends upon the title to the bed of a body of water.

The courts have had frequent opportunity to define the law controlling ownership of the beds of fresh water lakes in this state. But "the question has never been determined." (Stewart v. Turney, 237 N.Y. 117, 123). The courts have failed to establish any rule to be applied to this situation. Each case has been considered on its own particular facts. The most recent opinion to

come from the Court of Aopeals on the subject closed with the statement that no definite rule of general application could be stated and that the court was passing only on the case before it. (Granger v. City of Canandaigua, 257 N.Y. 126). Nevertheless, a survey of the decisions in this state indicates that the current of judicial thinking is flowing rather definitely in one direction and, I believe, can be made the basis of a reasonable prognosis regarding the disposition of similar cases in the future.

The problem of the ownership of land under lakes ultimately resolves itself into one of construing deeds which convey riparian lands. When the owner conveys lands bordering on a body of water, does a deed of the uplands carry the grantor's title to contiguous lands under water? The basic rule of construction requires that the intention of the parties be ascertained and effectuated wherever possible. (R.C.L., Deeds, sec. 93). In the absence of a clearcut expression of intention, a deed is generally to be construed most strongly against the grantor and in favor of the grantee. (R.C.L., Deeds, sec. 104). Consequently, when a private owner grants lands which run down to the edge of a body of water, he is presumed to convey such title as he has to adjoining lands under water.

All title to soil in this state was derived originally from the Dutch or the British Crown, if the first grantee took prior to July 4, 1776; or from the State, if the first grantee took subsequent to that date. In general it may be said that the same rule of construction applies to a grant from the State to an individual as to a deed from one private owner to another. (237 N.Y. 117). Consequently, the Treaty of Hartford, which has been much discussed in the cases (92 N.Y. 463), does not complicate our problem in the least. By that treaty in 1786 Massachusetts and New York settled a long-standing dispute regarding the sovereignty and ownership of what is now the western half of this state. New York granted to Massachusetts all right of property in the lands west of a line running north and south through Seneca Lake, and Massachusetts ceded to New York all right to the government, sovereignty, and jurisdiction over such territory. (Massachusetts v. New York, 271 U.S. 65). Thus, Massachusetts became the original grantee in private ownership of the lands in western New York and acquired no greater or different title to them than would a private individual under a similar grant. All title to soil west of the Treaty of Hartford line is to be traced back through Massachusetts to the State of New York. All title to soil east of that line is derived from grants by the Dutch, the British Crown, or the State. (16 Cornell Law Quarterly 279).

When the grantor's intention is expressed in the deed, it is controlling, whether such grantor is a government or a private owner. When no definite intention can be discerned, the law has raised presumptions of intention which are controlling. According to the civil law, under which the Dutch operated, all waters in fact navigable, including the bed thereof, are owned by the State for the benefit of the public. According to the English common law, waters where the tide ebbs and flows are called "navigable". Land under navigable waters, so defined, is held presumptively by the Crown for the public good, and to establish

private ownership a specific grant from the sovereign must be shown. The beds of non-tidal waters are presumed to belong to the riparian owners to the center, unless rebutted by an explicit deed. The Court of Appeals has definitely established that the common, and not the civil, law controls the construction of grants of land bordering on rivers in New York. "I know of no exception in this state to the common law rule of riparian ownership of the beds of fresh water streams, where not constituting boundary lines, other than the two rivers referred to (the Mohawk and Hudson). If not affected by situation or derived title, there is no good reason why the common law rule should not obtain with respect to our fresh water rivers." (Judge Gray in Fulton Light, H. and P. Co. v. State, 200 N.Y. 400, 414).

It was early realized, however, that the common law was not completely applicable to the lakes in this state, especially not to the larger ones. Observations obiter were made to that effect in several of the early cases. It was noted that "the English have no large inland bodies of stationary fresh water" unaffected by the tides, and that, though one might reason by analogy, one "could not expect to find decisions by the English tribunals upon questions which could not there very well arise". (19 Barb. 484, 490; 12 Barb. 206; 17 Wend. 597). "The principle itself (that is, the common law as to non-tidal waters) does not appear to be sufficiently broad to embrace our large fresh water lakes, or inland seas, which are wholly unprovided for by the common law of England. As to these there is neither flow of the tide, or thread of the stream, and our own local law appears to have assigned the shores down to the ordinary low water mark to the riparian owners, and the beds of the lakes with the islands therein to the public." (Canal Commissioners v. People ex rel. Tibbits, 5 Wend. 423, 447).

Despite this distaste for the common law regarding lakes which found expression in numerous early cases involving riparian rights, the Court of Appeals has applied the common law rule completely to small non-navigable lakes and ponds. It is logical and easy to presume that a grantor of lands bordering on a small alke should intend to convey his title to the soil under water also, because the value of such lakes is mainly in relation to the adjacent lands and the retention by the grantor of the ownership of the bed would be valueless. The rule as to such bodies of water cannot be better expressed than by quoting from Gouverneur v. National Ice Co. (143 N.Y. 355): "Whatever may be the doctrine applicable to small inland lakes and ponds elsewhere, the presumption in this state is that the land under their waters belongs to the proprietors of the adjoining lands". (p. 363). "Natural ponds and small lakes are private property. They pass by grant of land in which they are included. They are also presumed, if nothing appears to the contrary, to belong to the riparian owners. And there would seem to be no substantial reason for the application of a different rule in the legal construction of grants of land bounded on them than is applied to conveyances bounding premises on fresh water streams." (p. 359). A glance at a few of the decisions involving such lakes and ponds will give one an idea of how small is "small" when used in this connection. The case last referred to determined title to the bed of

Croton lake which has a length of 2,500 feet, a width of 800 feet, and a surface area of 45 acres. Cromwell lake which is 3000 feet long and 2000 feet wide (175 A.D. 153), Copake lake with an area of 500 acres (182 A.D. 546), and Fish lake with 600 acres (92 Hun 9) were similarly disposed of. The largest body of water placed in this category is Cazenovia lake which is five miles long and three-fourths of a mile in width. The lake is substantially non-navigable and the bed was held to belong to the owners of the adjoining uplands. (Ledyard v. Ten Eyck, 36 Barb. 102).

The converse of this situation obtains regarding large navigable lakes, such as Champlain, George, Cayuga, Seneca, and Oneida. No rule has been stated regarding lakes of this size. Title to the bed of none of these lakes has been definitely adjudicated. There is, however, very strong dictum regarding them. The conclusion is inevitable that the courts consider the common law inapplicable to such bodies of water as these and would hold that the State has never parted with title to their beds. Lake Champlain is about 150 miles long, has a varying width up to 15 miles, and an area of 1000 square miles. Regarding this lake the court observed, "It is contended that this principle (the common law as to non-tidal waters) does not apply to our lakes. And certainly it would seem preposterous to make the application to the full extent. Two islands in this lake, which I believe, nearly constitute a whole county in Vermont, by this rule should belong to the proprietors of the mainland . . . . No doubt the extent of the lake or body of water would have an influence in the construction of the grant . . . . .There can be no question in regard to a body of water the size of Lake Champlain. . . . It is perfectly clear to my mind that a grant of land bounded by this lake, does not extend to the middle of it." (Champlain and St. L. R. R. Co. v. Valentine, 19 Barb. 484, 490-491). Lake George is about 33 miles long and 1.4 miles wide, with an area of 45 square miles. In Chism v. Smith (138 A.D. 715; 210 N.Y. 198) the ownership of the bed of this lake was not determined. Both parties conceded that title to the bed was in the State and the trial court so found. The case of Stewart v. Turney (supra) involved title to the shore of Cayuga lake, which is 38 miles long and three miles wide. It was decided that the riparian owner, and not the State, owns the strip of land between high and low water on that lake. The case, however, is much more interesting for its dictum than for its adjudication. The court observed that a deed of land bounded by a non-tidal river or lake from an individual owning to the center thereof carries title to the thread of the stream or lake by presumption, and that the same doctrine applies to a contract between an individual and the government. Counsel contended that the rule is based on the presumed intention of the parties, and a presumption may be rebutted. The results flowing from its application to Cayuga lake would be so remarkable that the court should hold the physical situation to be such as to show no such intention could have been present. It cannot be supposed that the grantee of 100 square feet on the shore has attached to his property a strip of land under water two miles in length. The court commented, "Were it necessary we would hold, however, that with regard to a grant of land on Cayuga lake an exception should be made to the common law rule . . . . Where the law is unsettled the result of a proposed rule may turn

the scale. . . . With reference to such a body of water the ordinary rule is so impractical that we give weight to that consideration." (pp. 133-134). The Appellate Division has held that the bed of Seneca lake (being about 34 miles by three miles, having an area of 61 square miles) belongs to the State, though the Court of Appeals did not deem it necessary to determine that question. (City of Geneva v. Henson, 140 A.D. 49; 203 N.Y. 545). Seneca lake is in fact navigable and has been extensively navigated for a century and a half. During that time the State has assumed absolute dominion, control, and ownership of the lake, appropriating parts of it for public use without compensating adjacent proprietors for the land taken. Obviously the primary value of a navigable body of water consists in its navigability. In such a lake it is very difficult to distinguish the sovereignty or government control of the State from ownership in the land covered by water. It is hardly credible, therefore, that the State will part with title to the bed of a navigable body of water where it retains sovereignty over it, unless the language explicitly indicates that such was the purpose. These considerations influenced the conclusion of the Appellate Division.

From lakes clearly small and non-navigable and lakes clearly large and navigable we turn to lakes of medium size clearly within neither of thewe classes. In this third group are such lakes as Onondaga, Otsego, Keuka, Skaneateles, Hemlock, and Canandaigua. All of these lakes are navigable in fact and some of them are links in the system of internal transportation in this State. As to these lakes there is little adjudication and less dictum. In Sweet v. City of Syracuse, (129 N.Y. 316) the court refused to pass on the title to the bed of Skaneateles lake which is 15 miles long and one mile wide, with an area of 13 square miles. Ownership of the lands under Keuka lake, having an area of 17.5 square miles, has never been determined. (Crooked Lake Navigation Co. v. Keuka Navigation Co., 43 Hun 635). Hemlock lake is seven miles long and one-half mile wide, with a surface area of 1828 acres. Regarding it the Court of Appeals said, "We have arrived at the conclusion that all rights of property to the soil under the waters of Hemlock lake were acquired by and belong to its riparian owners, while such rights only over its waters belong to the State as pertain to sovereignty alone". (Smith v. City of Rochester, 92 N.Y. 463, 476). Canandaigua lake is larger, being 15.6 miles long and having an average width of one mile. As to this lake the Court of Appeals held exactly the reverse of its decision regarding Hemlock. "Conditions may alter cases but we hold that title to the bed of Canandaigua lake is in the State of New York in trust for all the people thereof." (Granter v. City of Canandaigua, supra, p. 132). These cases indicate, at least, that the fact of navigability is not the touchstone of public ownership. Navigability may have some influence on the court's decision, as suggested in City of Geneva v. Henson (supra), but alone it will not tip the scales. Hemlock lake is very narrow, really little more than a widened river. It is logical and feasible to apply the law of rivers to such a lake. Canandaigua is wider and correspondingly less river-like. It has been suggested that shape may be of more importance than size in determining title to the beds of lakes in the doubtful class. (16 Cornell Law Quarterly 285).

A glance at the disposition other jurisdictions have made of this problem and the reasoning they have applied to it might be enlightening. Foreign cases on riparian rights should be read with discrimination because they are frequently controlled by a local statute or constitution. In England the rule of the common law is still followed. "The Crown is not of common right entitled to the soil or waters of an inland, non-tidal lake. . . . There can be no difference in this respect between a small lake and a lake so large it may be termed an inland sea. In this country one and the same rule applies to inland, non-tidal waters, whatever the size of the water space may be." (Johnston v. O'Neill L. R. 1911 App. Cas. 552, 578). This rule has been strictly applied to Lough Neagh, an Irish lake 16 miles long and eight miles wide. (Bristow v. Cormican, L. R. 3 App. Cas. 641). Lakes in Scotland belong to the riparian owners. (Mackenzie v. Barkes, L. R. 3 App. Cas. 1324). In this country the Federal courts, in determining title to a lake completely within the limits of a state, apply the law of the state where the lake is located. (94 U. S. 324). However, the United States Supreme Court has evidenced its independence of the common law by applying to the Great Lakes the rule as to tidal waters. (Ill. Central R.R. Co. v. Ill., 146 U.S. 387). The New Jersey courts have said, "In this State there is nothing in topography or location that requires a departure from the rules of the common law". (32 N.J. Law 369). The riparian owners own land under lakes in Ohio (47 Ohio St. 326) and Indiana (121 Ind. 51). In Michigan it is observed with a simple logic irrefutable that, after all, a lake is merely a widened river and so the same rule should apply to both. (65 Mich 48). The rule in Massachusetts is established by a colonial ordinance of 1647 which declared great ponds (over 10 acres) to be public property. (108 Mass. 160; 131 Mass. 539). Maine and New Hampshire have followed Massachusetts. (13 Me. 198; 9 N.H. 461). In Vermont a riparian owner on Lake Champlain has title only to the low water mark. (28 Vt. 257). Wisconsin has held that the common law rule is thoroug ly inapplicable in a state having an inland sea on one side and a great navigable river on another, neither of which are tidal, and that a riparian owner takes no title to the bed of a lake, navigable or non-navigable. (42 Wisc. 214). Illinois holds that title to the beds of lakes is in the State. (130 Ill. 509). It may be said in general that states possessing lakes of any considerable size refuse to apply the common law doctrine, and hold that title to land under lakes is in the sovereign. (See 23 A.L.R. 757 for a full discussion of the rulings on this subject in the various states).

In deciding in the future cases which involve title to the beds of lakes in this state the Court of Appeals will doubtless consider such elements as size, shape, navigability, practical construction of grants under which title is claimed, and dominion and control of the State acquiesced in by the riparian owners. (16 Cornell Law Quarterly 282). It has been said that the strictness of the rule against the grantor should be relaxed somewhat when the sovereign grants land along waters in fact navigable. According to the Federal Supreme Court, "The dominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation must be indulged, in

construing all grants by the sovereign, of lands to be held in private ownership. Such lands are peculiarly subject to the rule, applicable generally, that all grants by or to a sovereign government, as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction." (Massachusetts v. New York, supra, p. 89). In Stewart v. Turney (supra) the Court of Appeals recognized the absurdity and impracticability of holding that title to the bed of a lake of any considerable size follows title to the adjoining uplands. The incongruity is so great as to actually violate the primary precept of the construction of deeds. This reasoning is equally valid regarding any lake the dimensions of which can be stated in miles, whether the lake is termed large or of medium size in relation to the other lakes in the state. In Granger v. City of Canandaigua (supra) the court recognized that the rights of the public are involved. "To hold that the sovereignty had dedicated the bed of such a lake to private uses, subject to rights of navigation only, would be not only to deprive the public of access to the water for recreation and enjoyment but also to deprive the riparian owners of their customary privileges. . . . Except as applied to comparatively small and narrow bodies of water, resembling rivers, rather than lakes, it seems no less contrary to our institutions to say that our fresh water lakes are the subject of private ownership." (p. 131) I believe it may be said with considerable foundation that beds of lakes which are small and non-navigable or narrow and river-like belong to the riparian owners to the center thereof, and that title to lands under all other lakes is in the State.

A. H. P.

PROOF OF THE FELONY IN FELONY MURDER

The precautionary rule stated in Penal Law Sec. 1041 that "No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of the killing by the defendant, as alleged, are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt" seems to take its origin from English jurists. The earliest caution as to the quantity of evidence required to convict was in 1680 by Sir Matthew Hale, Pleas of the Crown II, 290, in which he states: "I would never convict any person for stealing the goods cuisdam ignoti merely because he would not give an account of how he came by them, unless there was due proof made that a felony was committed of these goods. I would never convict any person of murder or manslaughter, unless the fact were proved to be done or at least the body found dead - for the sake of two cases, one mentioned in My Lord Coke's P.C., Cap. 104, p. 332, a Warwickshire case, another that happened in my remembrance in Staffordshire." The Warwickshire case was one in which an uncle was charged with the murder of his niece. He substituted a child to impersonate the niece and the fraud being discovered, he was hanged. In truth, the niece had run away and at the age of sixteen had returned to claim her property.

The strict enforcement of this rule has not found favor in all jurisdictions, Story, J. in 1834 (U.S. v. Gilbert, 2 Sumn. 1927) saying, "It would amount to a universal condonation of all murders committed on the high seas."

The question really resolves itself into the duty resting upon the prosecution to prove the corpus delicti of the crime. Many and varying definitions have been given to this term. The number of its elements are determined by the rules of the particular jurisdiction. In People v. Ranney (153 Mich.) referring to Wigmore on Evidence, Vol. III, Sec. 2072, the corpus delicti is said to have three component parts; first, the occurrence of the specific kind of injury or loss (as in homicide, a person deceased) secondly, somebody's criminality as the source of the loss - these together involving the commission of a crime by somebody; and thirdly, the accused's identity as the doer of the crime; that the term corpus delicti in its orthodox and logical sense signifies merely the first of the elements, namely, the fact of the specific loss although some judges have held that it includes the second element. Wigmore in the section above mentioned points out that the third requirement is not part of the corpus delicti. If it were, the corpus delicti would be synonomous with the whole charge requiring that the whole be evidenced in all three elements independently of a confession. A concise expression of the rules is given in Pitts v. State (43 Miss. 472): "in case of felonious homicide, the corpus delicti consists of two substantial fundamental facts: First, the fact of the death of the deceased; second, the fact of the existence of the criminal agency as the cause of the death. The first of these constituents is always required to be proved either by direct testimony or by presumptive evidence of the strongest kind; the second of the constituents becomes a proper

subject of presumptive reasoning upon all the facts and circumstances of the case."

This excerpt is representative of the judicial opinion of the country. The states of New York and Texas require direct proof of the death and are not satisfied with "presumptive evidence of the strongest kind". Whether or not this is a condonation of the murderer who can destroy the body of his victim is a debatable question. It very effectively forestalls any unwarranted convictions or miscarriages of justice. The provision of our present Penal Law Sec. 1041 (supra) is not new, having come from Penal Code Sec. 181, as amended in 1882 and is but a statement of the rule which existed at Common Law.

Whatever may be the disagreement of the courts as to the direct evidence of a death, there is absolute agreement that a person may not be convicted of a felony on his own confession alone. There must be additional proof of the corpus delicti. This additional proof may be direct or circumstantial except in the states which require direct proof of the death. Corroboration, as the term is properly used, means not merely tending to produce confidence in the truth of the confession, but as referring to facts which concern the corpus delicti. Sec. 395 of the Code of Criminal Procedure provides: "a confession of a defendant... is not sufficient to warrant his conviction without additional proof that the crime charged has been committed." In People v. Jaehne (103 N.Y. 182) it was held that the quoted section of the Code "seems to imply that the confession is to be treated as evidence of the corpus delicti; in other words, as competent proof of the body of the crime though insufficient without corroboration, to warrant a conviction." The finding of the body of the person charged to have been murdered with unmistakable marks thereon of a murder committed, is sufficient "additional proof" to meet the requirement of the section. (People v. Deacons, 109 N.Y. 374). The additional proof does not need to prove the whole body of the crime but only to connect defendant with his corpus delicti. The necessary distinction between felonies against the person or property and homicidal felonies must be kept in mind. The former can be proved in their entirety by circumstantial evidence; the latter require proof of a body, dead, because of the criminal act of the defendant.

The recent case of People v. Lytton (257 N.Y. 310) gives the first authoritative decision on what is now known as a "felony murder" under subd. 2, Sec. 1044, Penal Law, which provides, "the killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed ... without design to effect death by a person engaged in the commission of, or in an attempt to commit a felony either upon or affecting the person killed or otherwise." This case involved a negro who, by his confession, was attempting to rob a store keeper. The gun was accidentally discharged and the bullet from it killed the store keeper. The only evidence of the robbery or attempted robbery was the defendant's confession. The Court of Appeals sustained the conviction of murder first degree although the case was submitted to the jury on the theory that it was committed while in the act of

committing a felony. The indictment was in the Common Law form alleging the premeditated felonious act. Such an indictment allows proof that the killing was during the commission of a felony. (People v. Giblin, 115 N.Y. 198).

The Trial Court refused to charge that there must be corroboration of the confession not only as to the murder but also as to the independent felony. On appeal this ruling was sustained, the Court of Appeals pointing out, "The crime charged against this defendant is homicide and the fact that a homicide has been committed is proved without reference to the confession, by testimony of eye witnesses as well as discovery of the body bearing tokens of a fatal wound. This being done, the requirements of the Criminal Code must be held to have been satisfied." Further "the malice may be proved by showing that the act was done with a deliberate and premeditated design to kill. The case will then fall under Subd. 1 of Sec. 1044, P.L. It may be proved by showing that the act was done by one then and there engaged in the commission of another felony. The case will then fall under subd. 2. In one case as in the other, a single crime is charged, the independent felony, like the deliberate and premeditated attempt, being established only for the purpose of characterizing the degree of the crime so charged, the evil mind or purpose inherent in the killing." It is conceded that under the doctrine of People v. Deacons, (supra) the mere finding of the body in addition to the confession would be sufficient corroboration if the case were submitted on the theory of Subd. 1, Sec. 1044 (from a deliberate and premeditated design to effect the death of the person killed or another). In that event, however, the prosecution would have to prove the premeditation and deliberation and in addition, the jury could convict of any minor degree of homicide warranted by the evidence. As applied here, the statement just quoted, "It may be proved by showing that the act was done by one then and there engaged in the commission of another felony", seems difficult to sustain when the proof required is the showing that the defendant was engaged in a felony, whereas the felony can not be proved by the confession alone which was the only evidence presented of defendant's participation in that other felony.

Judge Crane wrote a formal concurrence which was practically a dissent. His opinion following the provisions of the statute seems to rest on sound logical basis. His theory is that confession of a felony without further proof of it, is not a sufficient foundation on which to base a first degree murder conviction as being committed by one engaged in a felony. From his opinion I quote in part:

"The important proof in a felony murder is the felony because this makes the act of killing murder in the first degree even though the defendant did not intend to kill. The form of the indictment cannot obscure the reality. . . . The felony, be it larceny or robbery must be proved beyond a reasonable doubt - so the court must charge the jury. Yet, under the present rule, the felony, be it burglary or larceny, may be established by the defendant's confession alone, whereas if he were being tried for the minor felony such as burglary or larceny he could not be convicted solely by his confession."

The same question was raised in State of Ohio v. Leuth (5 Ohio Circuit Court, 94 (1890)). The defendant was charged with murder in four counts. He was acquitted on the first, second, and fourth counts, but convicted of murder on the third count which alleged the killing during an attempt to rape. The defendant confessed to striking two blows with a hammer and that he killed her because he wanted connection with her. The body was hidden in the recesses of the cellar for nearly a month and the clothes were stripped from her and an attempt made to burn them. Sec. 6808 of the Revised Stat. in effect at that time, provided, "Whoever. . . in perpetrating or attempting to perpetrate any rape, arson, robbery, or burglary, kills another, is guilty of murder first degree." The defendant maintained that to convict for murder it was essential to prove two crimes and the several bodies of them, i.e. corpora delicti. The court answered this contention by stating an attempted rape in itself was not a crime and that the one crime charged was murder, that there was proof of death, by crime, of the victim and the agency of the accused. The court held that the defendant was not convicted under the wrong count because of the extra proof of death. It also stated (p. 108), "But the case is not without considerable other proof that the murderer was in pursuance of an attempt at rape, i.e. that he had stripped her of her clothes and her body was bound in that condition." This case bears a resemblance to People v. Lytton (supra) but it is not strictly analagous due to the fact that attempted rape was not a crime. If it were, the court said there was sufficient evidence in addition to the defendant's confession. It will be noted that there was some corroboration on which to base the assertion and to show the attempted rape sufficiently to convict of murder under that statute. The distinction between the Ohio statute and ours at the present time is thatthe former required only proof of attempted rape (not a crime and therefore no corpus delicti) and the latter requires proof of a killing while engaged in a felony (a crime which has a corpus delicti), a confession of which is not enough for conviction. Ohio v. Leuth is the only case where the same question was brought up as in People v. Lytton.

The concurring opinion of Judge Crane in People v. Joyce (233 N.Y. 61) was the only previous expression of a rule in relation to this type of case. It was unnecessary to the decision and was an additional reason for reversing a judgment of conviction. That was a case where the defendant was charged with the murder of a store keeper while engaged in the commission of a larceny. His confession was oral and made at various times after his arrest before he was formally brought to court for examination. The decision of the case really was on questions of evidence, but the concurring opinion of Crane and McLaughlin, JJ is worthy of note. At page 73 he says: "... in order to convict a defendant for the crime of murder in the first degree, it was necessary for the People to prove by competent evidence the commission of or an attempt to commit the felony. How could a homicide occur in the commission of a felony, if the felony be not proved? The felony, that is the larceny or robbery, cannot be proved by the confession of the defendant alone. If defendant were being rried for the collateral felony and his confession were the only evidence against him, an acquittal would be compulsory." At page 75: "The finding of the body alone would not be corroboration of larceny or robbery

as sufficient to sustain a conviction of murder in the first degree under the charge of the court that the jury must convict if they found him guilty of any crime."

People v. Marendi (213 N.Y. 600) was a case of alleged murder of a policeman and citizen by the defendant in an effort to escape after the officer had detained him to search for concealed weapons. The question in the case was whether the defendant was actually engaged in any felony either of escape or of the prior murder. At p. 611 the court says: "To justify a conviction of murder in the first degree for an unintentional homicide on the gound that it was committed while the defendant was actually engaged in the commission of a felony, every essential element of the latter crime must be established by evidence not left to be guessed at." In view of this expression of the court and the statutory enactment of Sec. 395, Code Crim. Proc., that a confession is not sufficient to warrant conviction without additional proof that the crime charged has been committed, it is submitted that prevailing opinions of People v. Lytton (257 N.Y. 310), requiring absolutely no corroboration of the confession to the minor felony, does not as readily appeal to reason as does the concurring one of Judge Crane, whatever may be its value as an aid to prosecutors who have procured confessions by some means or other. This is so, notwithstanding that a confession is competent proof of the crime, though insufficient, without corroboration, to warrant a conviction (People v. Jaehne, supra) because, while claiming competency for the confession, the statement concedes its inadequacy to secure a conviction.

However, the rule has been established by our highest court that evidence of a confession of a homicide perpetrated in the commission of another and independent felony, is sufficient to sustain a conviction for murder in the first degree where there is corroborating evidence of the homicide, i.e. discovery of the dead body, and that it is not necessary that the corroboration extend to the independent felony.

J. E. W.

PUBLIC POLICY AS EVIDENCED BY COGNATE STATUTES

The inquiry at which this paper purports to direct itself is prompted by the comparatively recent decision of the New York Court of Appeals in the case of F. A. Straus & Co., Inc. v. Canadian Pacific R.R. Co., (254 N.Y. 407). The defendant under a through bill of lading contracted to carry for the plaintiff a shipment of silk from Shanghai, China, via Vancouver to New York City. Three bales of silk were stolen before the shipment reached Vancouver for which the plaintiff sued in conversion. The defendant to escape liability relied on a clause in the bill of lading which recited in part, "The c rrier shall not be responsible to any extent for any loss . . . arising from . . . . negligence . . . of agents or other persons whomsoever in the service of the carriers or their agents . . ." Held, for the plaintiff and that the clause was of no effect as being against the public policy of the State as expressed by certain statutes making void contracts freeing similar carriers and bailees from liability for negligence. The court conceded that none of such statutes applied to this contract. (Personal Property Law, Sec. 189; Uniform Bills of Lading Act, Sec. 3; Public Service Comm. Law, Sec. 38; General Bus. Law, Sec. 91, Subdiv. i; Banking Law, Sec. 331) Moreover the court found that this particular agreement might easily have been enforcible under familiar Conflict of Laws rules, were it not for the equally familiar and also more fundamental rule that our public policy will supercede alleged rights acquired under another jurisdiction.

Besides undoubtedly changing the law of New York relating to a carrier's right to limit its liability for negligence the case suggests the questions: What in a given case can be said to evidence the public policy of the State in regard to the subject under discussion? and, How far can a court declare public policy and then create rights and liabilities on the basis of such declaration? Although the question will still be unanswered at the end of this review, they will serve as some foundation for what follows.

Public policy is generally described as that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public, or against the public good. In Story on Contracts we are told that, "it has never been defined by the courts, but has been left free of definition in the same manner as fraud. It may be safely said, however, that whenever any contract conflicts with the morals of the times, and contravenes any established interests of society, it is void, as being against public policy." But enough of definition, which assuredly gets us no where. As to the point under discussion, what do the Reports offer us?

It is not claimed that the court in the Straus case (supra) was without precedent. In fact something exactly parallel was held in S. & C. A. Commercial Co. v. Panama R.R. Co. (237 N.Y. 287). Here was involved the validity of an agreement with a common carrier limiting the time within which suit could be brought. Had the defendant come within control of the Interstate Commerce

Act, the agreement would have been void thereunder. But the case was not so easy. However it was said, "though the act does not govern, its standards are relevant to the inquiry whether public policy permits the enforcement of the contract." The assertion was made that there is a duty of "approximate conformity" on the part of carriers to meet the requirements of cognate statutes. Gooch v. Oregon Short Line R.R. Co. (258 U.S. 22) was cited to the effect that "a statute may indicate a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind." The same thing has been expressed another way. "The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will however indirectly, that will should be recogni æd and obeyed. (Johnson v. U.S., 163 Fed. Rep. 30, 32).

Further than this, things said in Hollis v. Drew Theological Seminary (95 N.Y. 166) are in point. They deserve mention here and at some length. The dispute was whether a foreign educational institution could take a bequest provided by a will made within two months of the testator's death. By a New York statute "for the incorporation of benevolent, charitable, scientific, and missionary societies," corporations formed thereunder could not take, if the will were made within two months of the testator's death. It was strenuously argued by the plaintiff that this expressed the public policy of the State and therefore any similar bequest should be held void. The finding of the court, however, was that the statute had no force outside itself. It was pointed out that the legislature had not imposed the limitation upon the many corporations which existed prior to 1848, and since that date it had sometimes imposed it and sometimes not. "That cannot be enforced as public policy by the courts which the legislature one day prohibits in some cases, and another day permits in other cases." The reasoning of Hollis v. Drew, etc. (supra) was affirmed in later and similar cases, in each one the court holding in effect that a disposal of property by a testator cannot be declared void unless the case comes directly within a prohibitory statute, there being nothing clearly vicious in a testator disposing of his property any way he pleases. (Cross v. U.S. Trust Co., 131 N.Y. 330; Dammert v. Osborn, 140 N.Y. 30; Matter of Lampson, 161 N.Y. 511; St. John v. Andrews Institute, 191 N.Y. 254) This line of decisions, although having held against the application of public policy as evidenced by statutes, certainly says by inference that in a proper case such could quite properly be done. That the doctrine is fairly familiar in the Reports will be seen from the foregoing.

In finding the agreement void in the instant case, the court affirmed without qualification the words of People v. Hawkins (157 N.Y. 1) that "A state can have no public policy except what is to be found in its constitution and laws. . . . Therefore, when we speak of the public policy of the State we mean the law of the State, whether found in the constitution, the statutes, or judicial records." An examination of that case, however, shows that it was decided on the grounds that the statute in question was violative of both the State and Federal Constitutions. Surely, if public policy means anything it means more than enforcing the law, either constitutional or statute. If a law violates a

superior law, it is void for that reason and it is idle to talk of public policy. That People v. Hawkins and kindred cases are entirely different from the Straus case must be evident.

It will not be seriously disputed that the tendency of such decisions as hold that statutes express public policy and actually control situations admittedly not within their terms is toward the entrenchment of judicial legislation - something which must be regarded as at least a potential evil as long as we are to have a government of laws and not of men. We must certainly start with the proposition that it is our scheme of government that the legislature makes the laws and that the judiciary interprets them. It is true that in interpretation a certain element of public policy, or better, the policy of the law, will enter into consideration. But still it is the law as the legislature is deemed to have meant it that will be enforced, and not any public policy which the judges see fit to see created by that law. The fact that the will of the legislature is oft-times frustrated need not here embarrass the argument. Such is the exception and not the rule.

But, although the tendency is bad, perhaps there need be no cause for alarm. Especially is this true if the admonition contained in the Hollis case be followed. There it was said, "It is difficult to define and limit the power thus to enforce public policy which is not found in the statute law, and it should be exercised only in clear cases . . ." Some such clear cases were listed to be contracts tending to undermine public morals, to endanger the public health, to improperly influence public officers, and to restrain trade or marriage. To again quote, "In condemning such contracts judges have . . . in a remote sense assumed legislative functions". It is fairly plain that the great majority of cases which bring forth pronouncements of public policy from the courts involve in the first instance some transaction of a public nature. In many instances, of course, this is purely theoretical. For example, what portion of the public have any real concern in a contract restraining marriage? Yet the welfare of the State requires the existence of the fiction that the public is concerned. And so it is with many such agreements. Their invalidity is well established, not by judicial mandate but by the common law itself. That the courts should be granted great latitude in passing on such questions will not easily admit of doubt. When, if ever, they judiciously legislate in purely private matters, then will be time enough for real concern.

Another fault can be found with the implications of the Straus case. If we admit that public policy is to be measured by the enactments of the legislature, must we not admit the further fact that it will change with the legislative will? It is submitted that the one follows from the other, yet one hesitates to unqualifiedly endorse the proposition. Public policy is variable to be sure. "The variability of public policy is a stone in the edifice of the doctrine and not a missile to be flung at it." (Percy H. Winfield, Public Policy in the English Common Law, 42 Harvard Law Review 76, 95). But are we willing to say that so profound a legal concept as public policy must change with every new enactment of a capricious legislature? Yet the cases

imply as much. It would not be surprising if the Court of Appeals, when the occasion arises, is quick to limit, if not reverse, what it has recently held.

As earlier stated, the instant case is a departure from a hitherto fixed principle of New York law, that is, that in the absence of statutory prohibition, a common carrier could exempt itself from liability due to its negligence. But one will search the reports in vain for a statement to that effect. Instead the court enforced the public policy of the State as they found it "in the Constitution, the statutes, or judicial records". They chose to find thepublic policy in statutes which they agreed did not by themselves control the case. How easy it would have been to have found New York State's public policy in the judicial records, a long line of which supported the contention of the defendant. (Henman v. Powers, 226 N.Y. 305). This observation makes the potency of the opinion less attractive. The same rule could have been applied and an entirely different result reached. Had the court admitted they were overruling themselves, instead of so judiciously beating around the bush, their opinion would not be open to this pointed criticism.

Loucks v. Standard Oil Co. (224 N.Y. 99) could well have been authority for finding for the defendant in Straus v. Canadian, etc. (supra), in which it must be remembered the defendant was deprived by our court of a vested contractual right. In the former case the question was whether or not New York would enforce a foreign statute giving a minimum recovery in certain tort actions. The discussion, to some degree, narrowed down to what our public policy would permit us to do. The court said, "Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home . . . . they (the court of N. Y.) do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal." In consideration of the long line of decisions in this State enforcing such contracts as in the Straus case condemned, it is difficult to see how an opposite finding in the case would not have been justified under the rule laid down in the Loucks case.

This review has criticised the Straus and kindred cases. It is not contended, however, that an injustice has been done. Here perhaps the end justified the means. It is not asserted that a little judicial legislation is bad, except as it may tend toward something worse. Yet the courts will be as quick to retract as they have been to go ahead. We can depend on the implications of the statement: ". . . what the reports do not give us is the silent traditions which influence the judges in administering the law . . ." (42 Harvard Law Review, 76, 91, supra) And from the same brilliant article: "The value of the doctrine (public policy) depends on the men who administer it, and the nation may rest assured that it is in safe hands." The writer referred to England. That the thought applies equally well to the State of New York seems unnecessary to say.

In 1824 Judge Burrough in England, speaking of public policy in Richardson v. Mellish (2 Bing. 229), voiced what has become a very famous metaphor. He said, "it is a very unruly horse and when once you get astride it you never know where it will carry you." The best we can do is hope that in their ever-renewed efforts to ride the beast, the courts will not be taken too far afield.

H. S. V. S.

Editorial Note:

The Court of Appeals has recently determined in Fox v. Western New York Motor Lines, Inc. (257 N.Y. 305) that Section 211-a of the Civil Practice Act when read in conjunction with Section 193 (2) does not give a defendant the right to bring in by motion a joint tort feasor as additional party defendant. This decision reverses the determination of the question made by the Appellate Division (232 A.D. 308). For a full discussion of this subject, see "Contribution between Joint Tort Feasors", 1 Law Review 8, appearing in our issue for November, 1931, which is in accord with the conclusion reached by the Court of Appeals.

CURRENT DECISIONS

* * *

INSURANCE LAW — HOMICIDES AS ACCIDENTS

Piotrowski slumped over in the seat of the car he had stolen; it slewed off the road, no longer attempting to escape the pursuing squad auto. Police marksmen had killed him. The beneficiary of his insurance policy sought to hold the Insurance Company for its double indemnity payable only in case of death by "external, violent, and accidental means". The means here was external and most certainly violent, but, said the court, it was not accidental and the company had no extra liability. (Piotrowski v. Prudential Life Insurance Co., 141 Misc. 172).

Beck helped the drunkard, Tapp, push his auto out of the ditch. Tapp, in a maudlin frenzy, accused Beck of having ditched the car, drew a gun, and shot him. Beck drew his gun, fired, but fell dead. Tapp's first shot had taken effect. Beck's insurance policy contained a provision similar to the one in the case above. His beneficiaries sued to enforce it. The Insurance Company interposed the plausible defense that his death was not accidental, that the shooting was intentional, not inadvertent. The court allowed recovery holding the death was an accident. (Mutual Life Insurance Co. v. Sargent, 51 Fed (2nd) 4).

Casual reading of the cases causes surprise at the court's seemingly contradictory holdings. Such surprise is unjustified; there is no inconsistency. Clear cut, logical rules of law resolve whatever slight confusion may apparently exist in the facts.

An accident is defined in Paul v. Travelers Ins. Co. (112 N.Y. 472) as "the happening of an event without the aid or the design of the person and which is unforeseen." The "person" referred to is the unfortunate individual - the victim of the accident. It is his foresight, his design, that determines the character of his injury, and as an incident, his beneficiary's opinion of him. But the Law is not so naive as to use his actual foresight or his declared intent or design as the controlling one. Rather it makes use of that judicial Frankenstein, a reasonable man. The inquiry then is: What would a reasonable man's intent have been under the circumstances? What would such a reasonable man's foresight or expectation have been in that given situation? Piotrowski intended to escape from the commission of a felony. As a reasonable man, he should have foreseen pursuit, and, intending, as he did, to continue flight, he should have foreseen the ultimate in attempts to capture him. He should have foreseen his possible death. His death could not be accidental.

Conversely, Beck's death was accidental because a reasonable man, in his position, would not expect to be shot down. Beck was merely trying to help Tapp out of his predicament. He did nothing consciously to lead to his being murdered. His demise comes within the legal definition of an accident.

These cases are dealt with only because they are the most recent examples of a long line of similar ones. The law on the point is settled. But its application in every case seems so pleasantly logical that it is worthy of notice. In Fidelity Insurance Co. v. Johnson (72 Miss. 333) death by hanging at the hands of a mob was held to be an accident. In legal theory, no one could foresee mob rule or lynch law. In Blackstone v. Insurance Co. (74 Mich. 592) the insured, while violently insane killed himself. This was held to be an accident, not the act of his own will in legal contemplation, but that of a madman, "though that madman was himself". A more extreme, but certainly well reasoned case held that even where the deceased had slapped and pushed a drunkard in attempting to eject him from a room, he could not have foreseen that the inebriate would shoot him down. (Lovelace v. Travelers Association, 136 Mo. 104). He might have foreseen a blow, but not a shot. A railroad conductor ordered a negro out of a toilet room so that he might collect his fare. After repeated refusals, the conductor held a revolver up above the top of the partition, without pointing it at the occupant. Then he climbed on the back of the seat next to the partition to look over it. As his head cleared the top, the negro shot him dead. His death was held accidental; he had not assaulted the negro with the revolver, and should not have foreseen the negro's use of one. (Employers Indemnity Corp. v. Grant, 271 Fed 136). The operator of a crane on a bridge construction job who jumped in the river to avoid injury when the crane boom broke and contracted pneumonia from his wetting, was injured by accident. Here, while he could foresee the result that might flow from his act, the act was so much an automatic reaction to the situation that it was not voluntary enough to defeat recovery. (Rist v. Larkin, 171 A.D. 71).

Cases which fall outside the rule are decided with the same nicety of reasoning. The city fireman who contracted pneumonia from a wetting he experienced while fighting a fire was not injured by accident. Such a wetting he must have foreseen as part of his work. (Landers v. City of Muskegon, 196 Mich. 750). The murderer who is executed pursuant to judgment of a court is not killed by accident. A reasonable man, committing the crime he did, would have foreseen the death penalty. (Burt v. Union Central Life Ins. Co., 187 U.S. 362; Diamond v. N. Y. Life Ins. Co., 42 Fed. (2nd) 910). In Taliafero v. Traveler's Association of America (80 Fed. 368) the court denied recovery because the deceased had drawn his pistol and struck at a business competitor with it. The competitor's instantaneous reaction was to shoot his assailant dead. The deceased had committed an assault with a deadly weapon and should have expected the fatal result. Again, when the insured died from blood poisoning which infected a slight scratch on his hand received when he hit a man in the mouth, his beneficiary could not recover as on an accident. True, there was no assault with a deadly weapon, but the deceased had intended to hit the man's mouth and from such a blow, a scratch might well follow. The subsequent blood poison could not change the scratch that should have been foreseen into one accidentally received. (Fidelity Co. v. Stacey, 143 Fed. 271)

These are the more famous cases which involve the accidental character of injuries intentionally inflicted by third persons.

Novel sets of facts will arise in the future. They will be easily decided by ap lying the rule contained in this series of precedents. The changing environment of future generations may well alter the focus of a reasonable man's foresight. It can not change its efficiency as a factor in the definition of an accident.

G. R. B.

* * * *

MUNICIPAL CORPORATIONS LIABILITY FOR NEGLIGENCE

In the recent case of Baty v. City of Binghamton (141 Misc. 127) the Supreme Court passed upon a state of facts which to the knowledge of the writer had never been brought before a New York State Court for adjudication.

There are many cases which have been decided by the courts of this and other states showing the line of demarcation between governmental and corporate functions. When once a distinction has been reached and a particular function classified, the law in each instance is well-settled. In the former, the Municipal corporation is not liable for the negligent acts of its officers and servants, whereas, the municipality in the exercise of corporate functions is liable for the acts of its officers and agents. (Maximilian v. Mayor, 62 N.Y. 160; LeFrois v. County of Monroe, 162 N.Y. 563). The instant case, however, presents a novel and interesting sidelight on this problem.

> Plaintiff entered the Municipal Building of defendant City for the purpose of paying a regular city tax on real estate owned by her. After entering the building she proceeded to the City Treasurer's office where the tax was payable. She paid the tax, turned to leave, slipped on soapy water left upon the floor by an employee. The jury found the employee negligent and the plaintiff free from contributory negligence. The City Court, Common Council, Bureau of Charities, Departments of Health, Sewers, Sidewalks, and Streets, and Public Works are housed and maintained in the building. It was undisputed that the City Treasurer's office collected funds for all the private enterprises of the defendant City:- Collected all moneys payable to the City for every purpose, including water rates, and all funds in connection with the operation of the department of public works and parks. All special assessments are collected by the City Treasurer at his office in the City Hall.

The Court held the defendant was using its City Treasurer's office for joint business and governmental use and it cannot escape liability on the ground that it was performing public or governmental functions only.

The Appellate Division in a decision unreported at this writing reversed the lower court and held that the collection of taxes is a municipal function and that the maintenance and cleanliness of this office provided by the city is incidental to the collectio.

of taxes as the repairs of a station house are incidental to the maintenance of a police force. (Wilcox v. Rochester, 190 N.Y. 137, 144)."

The question involved in this case is, at least in the mind of the Justice writing for the lower court: Was the defendant City in the maintenance of and operation of its Municipal Building, known as the City Hall, and in the maintenance and operation in such building of the City Treasurer's office, performing and exercising public and governmental functions only, or was the City acting in a private or corporate capacity?

Apparently, the Justices of the Appellate Division, Third Department, were not of the same opinion for they based their decision upon the holding in the Wilcox case (supra).

In the opinion of the writer the Appellate Division evaded the issue by resorting to a decision which was not controlling either in logic, by reason of dissimilar facts, or in justice, by reason of changing public opinion. Furthermore, it is suspected that some of the undisputed facts were overlooked in arriving at a decision.

The question as to liability when governmental and corporate functions are "inextricably mixed" was made an issue from three viewpoints: (1) The negligent servant was employed to clean the City Hall which housed departments devoted to both functions. In the Rochester case the building was devoted solely to governmental functions. (2) The taxes which plaintiff paid were expended to sustain private enterprises as well as governmental. The Appellate Division states the collection of taxes is a governmental function. (3) The undisputed facts show that water rates, special assessments, and all funds in connection with the operation of the department of public works and parks, which functions have been held private, were collected by the office in which the accident occurred - (Municipal Parks: Augustine v. Town of Brant, 249 N.Y. 198; Water department: Oakes Co. v. New York City, 206 N.Y. 221; Playgrounds: Lane v. City of Buffalo, 232 A.D. 334). This latter point was not treated in the opinion of the higher court, unless the all-inclusive phrase - the collection of taxes - covers the collection of monies for the sole purpose of maintaining private functions.

The question, when made an issue, as was done in the lower court, presents a very interesting phase of the law of municipal corporations, not merely because it remains unanswered by our New York Court of Appeals but because it presents a splendid opportunity for the courts to sidestep the arbitrary and unpopular rule set down by the highest court of this State in Maximilian v. Mayor (62 N.Y. 160).

Even in the exercise of governmental functions, the doctrine of non-liability of municipal corporations, has been questioned and condemned. Judge Pound in Augustine v. Town of Brant (supra) cites with approval the statement of Borchard, in 34 Yale Law Journal 358, that "the modern tendency is against the rule of non-liability." Cardozo in his work, Law and Literature, at page 57

states in effect that the line of demarcation between governmental and private functions "though it were plainer, has at best a dubious correspondence with any dividing line of justice". (See also 34 Harvard Law Review 66).

The problem has arisen in Pennsylvania in the case of Bell v. Pittsburgh (297 Pa. St. 185), wherein the building was used partly for business and partly for governmental purposes. The court held in effect that the municipality cannot escape liability and the cedision was cited with approval by the Supreme Court Justice in the instant case.

Once the question is raised, whether or not the Court of Appeals will hold a municipality liable for the negligence of its servants under the circumstances is a question of public policy. Has not the theory that underlies the present doctrine - that the sovereign can do no wrong - been long discarded? Has not the present doctrine been criticised by leading jurists? Have not the people of this State expressed their dissatisfaction by passing a statute allowing the State to waive its immunity from liability for torts of its officers and employees? I respectfully submit that the opinion of the lower court more nearly coincides with the present day judicial thought.

J. R. N.

* * * *

INSURANCE LAW - EFFECT ON SECTION 211-A OF CIVIL PRACTICE ACT

Out of an abundance of automobile negligence actions, out of the vast amount of indemnity created by liability insurance carried by owners, and out of recent legislation on insurer's obligations, arises a new angle of tort feasor liability under Section 211-a of the Civil Practice Act. Although novel, it will not be at all an infrequent occurrence. Its practical application to every day lawsuits prompts inquiry.

In Metropolitan Casualty Ins. Co. of New York v. Union Indemnity Co. (141 Misc. 792), the situation is squarely presented for the first time. The plaintiff issued a policy of liability insurance to Joseph Jacobs. Defendant issued a similar policy to Jacob DeRyke. Judgments for personal injuries were recovered against them both by reason of their joint negligence. DeRyke was insolvent. The plaintiff's liability was limited to $5000, and it paid that amount upon said judgments and now seeks to compel contribution from defendant.

Substance of contention favoring contribution:

1. The plaintiff having paid the judgment recovered against its insured became subrogated to its rights and entitled to any remedy the assured might have pursued if he had paid the judgment. (Ocean A. & G. Corp. v. Hooker E. Co., 240 N.Y. 37)
2. Section 211-a of Civil Practice Act permits one joint tort feasor who has paid a judgment recovered against him and others to recover from the other joint tort feasors their

pro-rata shares of such judgment;

3. Section 109 of the Insurance Law provides, that "the insolvency of the person insured shall not release the insurance carrier from payment of damages for injury sustained, . . an action may be maintained by the injured person, against such insurer under the terms of the policy . . ."

Substance of contention against contribution:

1. Section 211-a of Civil Practice Act was passed in 1928;
2. Section 109 of Insurance Law was passed in 1924. This statute being in derogation of common law will be strictly construed. "The Legislature may not be presumed to make any innovation upon the common law further than is required by the mischief to be remedied." (Psota v. Long Island R.R. Co., 246 N.Y. 388, 393). This statute was prompted by a definite mischief. Before its enactment, the insolvency of the assured was equivalent in effect to a release of the surety. The policy was one of indemnity against loss suffered by the principal and loss to him there was none, if he was unable to pay. Section 109 of the Insurance Law was passed to alleviate this injustice by giving the injured claimant a cause of action against the insurer on the judgment. In 1924 one joint tort feasor paying the judgment had no right of contribution. (New York Consolidated R.R. Co. v. Mass. Ins. Co., 193 A.D. 438; affd. 233 N.Y. 547). The insolvency of the other insured tort feasor did not create an injustice to be remedied. There never was a substantial right even in time of solvency, since 211-a of Civil Practice Act had not as yet been passed. Hence plaintiff cannot claim aid of 109 of the Insurance Law.

Judge Cunningham of Supreme Court in Monroe County decided for defendant. Without opinion he was affirmed in 239 A.D. 827; 255 N.Y. 596. Legal precedent relative to innovations on common law made it impossible for the court to hold that a statute of 1924 could have been intended to remedy a situation which could not have been contemplated until the enactment of a statute in 1928. The judiciary interprets laws as they exist. It cannot pass on its sufficiency or create proper laws.

The Legislature might now deem it advisable to amend Section 109 of the Insurance Law so as to aid a tort feasor, who has obtained a right of contribution under 211-a of the Civil Practice Act, in recovering from the insurer. There exists the same equities for such an act as there existed in 1924. By payment of a joint judgment, a tort feasor is vested with a substantive right by virtue of the statute. To the extent of the amount in excess of his pro-rata share, the plaintiff's claim is as valid in the eyes of the law as the injured party's claim for the entire judgment. Once the Legislature saw fit to sever the theoretical claim of liability, wherein insurers are by a legal fiction indemnitors but in reality the ultimate and principal payor. Such action saved the claim of one type of injured party. The Legislature should in fairness amend its remedial act to include a parallel situation.

The partial efficacy of 211-a of the Civil Practice Act will be restored.

CONSTITUTIONAL LAW WITNESSES CONTEMPT

The control of a state over its citizens or persons domiciled therein, who are temporarily or permanently absent from the state, gives rise to an interesting question of jurisdiction. In a recent case, Blackmer v. U. S. (49 Fed (2nd) 523), a Federal Statute (Act of July 3, 1926, 44 Stat. 855) which made domicile and allegiance a basis for extra-territorial jurisdiction in personam, was held to be constitutional.

The statute authorized service of a subpoena upon a citizen of the United States, or a person domiciled therein, who was residing abroad, declaring disobedience contempt, and providing for seizure of his property to satisfy any judgment that might be rendered against such witness in the contempt proceeding. Blackmer, a citizen of the United States, residing in France, was sought as a witness on behalf of the United States at the trial of Sinclair and Fall, who were charged with having conspired to defraud the United States, and was served with a subpoena pursuant to this statute. Upon his failure to appear, he was fined $30,000 which was satisfied out of Liberty Loan bonds belonging to him, which were seized by a marshall.

The case justified the statute on the theory that since a citizen "is entitled to the protection of his government, in return the government is entitled to his unqualified allegiance"-and that this allegiance is a sufficient basis for jurisdiction over him while he is abroad.

Other decisions have been rendered upon similar reasoning. In Cook v. Tait (265 U.S. 47) it was ruled that Congress has power to tax income received by a citizen of the United States domiciled abroad from property situated abroad, and in U. S. v. Bowman (260 U.S. 94) it was held that citizens of the United States while in a foreign country are subject to penal laws passed by the United States to protect itself and its property.

It also seems that one domiciled in a state owes allegiance thereto so as to permit in personam jurisdiction to be acquired over him even though absent from the state. (Huntley v. Baker, 33 Hun 580; Hunt v. Hunt, 72 N.Y. 217). Therefore it follows that a state of the United States may pass a statute similar to the one in question permitting in all cases the service of a subpoena on a person domiciled therein, while temporarily in another state - whether he is a citizen or an alien - and in event of his failure to appear to fine him and satisfy the fine out of his real or personal property in the state.

New York State has a statute (C.P.A. 406-a) which applies only to witnesses required to testify before the legislature or its committees. Its constitutionality has not been tested, but it seems that the same reasoning applied to the Federal statute can also be applied to this statute.

The ruling herein is a wise one and is a progressive step in

preventing a citizen from clogging the wheels of justice by keeping without the jurisdiction.

H. A. L.

* * * *

ELECTION LAW - BALLOTS - CONSTITUTIONALITY OF SECTION 249

The Election Law provided that where the candidate of one political party was nominated by one or more independent bodies his name should be printed in the column of candidates of such independent bodies only when they had nominated candidates for fifty percent of the offices to be filled at such election. Otherwise his name should only be printed in the column of candidates of such political party with the name and emblem of such independent bodies appearing in addition. (Election Law, Sec. 249)

This section was declared unconstitutional in Mat. of Crane v. Voorhis (257 N.Y. 298) on the theory that it deprived the voters of the same right and equal opportunity to express their choice of candidates. A candidate not having his name printed in the column of candidates of such independent body would be overlooked by voters intending to vote for the candidates of such body, unless such voter went to the greater trouble of closely examining and carefully scrutinizing the ballot to discover the candidate's name. This means that the voter desiring to vote for him as the candidate of such independent body has not an equal opportunity to express his choice as compared with a voter for another party's candidate.

Many states hold that all voters are constitutionally assured only the right of reasonable opportunity, but not of equal facilities for expressing their choice, (Todd v. Election Commissioners, 104 Mich. 474), or that ballots are not to furnish voters with information as to the persons who are candidates of their respective parties but to enable them to indicate the candidates of their individual choice. (People v. Czarnecki, 256 Ill. 320; State v. Coburn, 260 Mo. 177; State v. Wileman, 49 Mont. 436). Other states, however, hold that the same opportunity for expressing a choice is constitutionally assured to all voters. (12 Pa. Dist. 50; Murphy v. Curry, 137 Calif. 479)

In New York the equality of right is inherent in our constitutional theory, being first expressed in our Constitution of 1777. Sec. 1, Art. 1 of our present Constitution states that no member of this State shall be disfranchised unless by the law of the land or the judgment of his peers. Therefore the power to conduct elections given under Sec. 5, Art. 2 cannot be exercised to impair this right of the citizen and any system that in any way unnecessarily hinders the electors from voting, or voting for the candidates of their choice violates the Constitution. (Hopper v. Britt, 203 N.Y. 104; Mat. Gilfillan v. Beyer, 240 N.Y. 574; Mat. Sullivan v. Beyer, 240 N.Y. 574; Mat. Haskell v. Voorhis, 246 N.Y. 256; Mat. Callaghan, v. Voorhis, 252 N.Y. 14).

L. P. W.

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RIGHTS OF CREDITORS TO PROCEEDS OF A WIFE'S INSURANCE POLICY.

By Chapter 80 of the Laws of 1840 the legislature enacted the first statute enabling a wife to insure the life of her husband or a husband to insure his own life for the benefit of his wife. This was before the Married Women's Acts and they were still under common law disabilities. As a result there was at the time grave doubt as to whether a wife could insure the life of her husband. It was believed that the only way in which a husband could provide for the maintenance of his wife was by insuring his own life for the benefit of his estate, as part of which it would go to her. But only after his debts had been paid, for this method subjected the proceeds to the rights of creditors. (Rose v. Mutual Benefit Life Insurance Co. 23 N.Y. 516).

Chapter 80 was passed to enable the husband to provide for the care of his wife after his death and to have the amount provided go to her free from the claims of creditors. It also enabled the wife to insure for her own benefit. It read substantially the same as the present section 52 of the Domestic Relations Law except that the amount of exemption from claims of creditors was less. Some early cases held that it was intended to give the wife the benefit of an annual saving on the part of the husband (Mat. of Thompson, 184 N.Y. 36).

The present law, section 52 of the Domestic Relations Law, reads as follows: "Insurance of husband's life. A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term, she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representative of her husband, except, that where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars, is primarily liable for the husband's debts."

Under this statute a wife clearly could insure the life of her husband and the proceeds of the insurance would in no event be liable for the husband's debts if she paid the premiums on the policy or policies. The premium however must have been in fact paid from her separate property and the burden is on her to prove that it was actually from such. (Guardian Trust Co. v. Straus, 201 N.Y. 546). If the husband paid the premium, then the insurance purchased by any amount in excess of five hundred dollars paid by him annually as premiums was primarily liable for his debts. It has been held that this "primarily liable" means, liable only where there are not sufficient assets in the estate to pay the debts. (Quinley v. Quinley, 221 App.Div. 532). Though the statute does not specifically mention policies taken out on his own life with his wife as beneficiary, it has been so construed that it is immaterial whether the husband takes it out for his wife's benefit or she takes it out for herself. (Chatham Phenix Nat. Bank v. Crosney, 251 N.Y. 189;

Wagner v. Thiercot, 236 N.Y. 588). And the mere fact that he reserves the right to change the beneficiary does not alter the situation. (Maurice v. Travellers' Ins. Co., 121 Misc. 427). The only material questions in determining the rights of creditors to the proceeds of a policy of insurance on the life of a man for the benefit of his wife were: (1) Who pays the premiums, and (2) if he pays them do they exceed five hundred dollars, and, if so, by how much? This statute (section 52 of the Domestic Relations Law) was, however, either in whole or in part amended or repealed by section 55 of the Insurance Law, (chapter 468 of the Laws of 1927).

Section 55-a of the Insurance Law provides: "Rights of creditors and beneficiaries under policies of life insurance. If a policy of life insurance, whether heretofore or hereafter issued, is effected by any person on his own life or on another's life, in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so affecting such insurance or his executors or administrators, shall be entitled to its proceeds, and avails against the creditors and representatives of the insured and of the person effecting the same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person; provided, that, subject to the statute of limitations, the amount of any premium for said insurance paid with intent to defraud creditors, with interest thereon, shall innure to their benefit from the proceeds of the policy:..."

This statute is in part clearly inconsistent with section 52 of the Domestic Relations Law. The first question which arises is: What are the creditor's rights to recover premiums in excess of five hundred dollars from the proceeds of all insurance purchased with annual premiums in excess of five hundred dollars paid from the husband's property? Section 52 was first enacted when the rights of a wife to insure her husband's life and the husband's rights to insure for his wife were in doubt. Since then married women have been relieved of the common law disabilities, and as to insurance it is expressly provided by section 55 of the Insurance Law that a wife can insure her husband's life. Section 52 is now unnecessary for the purposes originally intended, that is, to increase the right of a man to provide for his wife. It has rather come to be a limitation upon that right by giving creditors rights to the proceeds which they would not have if anyone else were named as beneficiary. (New York Plumbers' Specialties Co. v. Stein, 136 Misc. 703).

Section 55-a has been held to have repealed section 52 as to the rights of creditors to the proceeds of insurance purchased with premiums in excess of five hundred dollars. It is decided that they can recover only premiums in excess of five hundred dollars paid by the husband in fraud of creditors, thus giving them no greater rights in a case of a wife's policy than in any other. (Chatham Phenix Nat. Bank v. Crosney, supra). In United States Mortgage and Trust

Co. v. Ruggles (258 N.Y. 32) where the question arose as to the rights of creditors to recover the amount of premiums paid in fraud of creditors, the court reiterated the law stated in the Crosney case as to the amount purchased by premiums in excess of five hundred dollars and then decided the case on the theory that the statute did not have extra-territorial effect and could not apply to contracts made out of the state and so the case was decided under other laws.

The questions as to the right to recover any premiums less than five hundred dollars, paid in fraud of creditors, from the proceeds of insurance purchased by premiums in excess of five hundred dollars paid annually from the husband's property, and as to the right to recover any premiums paid in fraud of creditors from the proceeds of insurance purchased by premiums not in excess of five hundred dollars paid annually from the husband's property were both expressly left undecided in the Crosney case.

When the legislature first enacted section 52, their intent was to give a husband the absolute right to provide a fund for his wife's and children's support free from all claims of creditors. They decided, not that a husband could cut off the rights of creditors to such property as he should set over to his wife, but rather that public policy demanded that a man be able to make such provision for his widow and children that they should neither become destitute nor a public charge because of debts he owed, but that he be able to make provision for them to a reasonable extent, that is, five hundred dollars' worth of insurance. They may also have felt that a man's life is no part of the assets of his estate and that a wife should be protected against the loss of this invaluable possession.

Did the legislature intend to deprive this entire statute, which has in past represented the public policy of this state for the last ninety-two years, of all effect as a result of a possible inconsistency between that and another statute intended primarily to affect another situation which existed at common law? The fact that section 52 was to some extent discussed in the Senate in connection with section 55-a when that statute was a bill before that body in 1927, and that it was the intent of the Senate that this bill should affect the rights of creditors to a wife's policy of insurance would seem to indicate that they intended to qualify section 52 in part only, rather than to abrogate it completely. Otherwise they would have repealed it then by statute.

Unquestionably section 55-a should affect creditor's rights in so far as their rights to the proceeds of insurance for a man's wife, the person having the most to lose by his death, exceeded their rights to the proceeds of insurance for any other person. They could not have knowingly intended to abrogate completely by mere implication a part of a statute, which definitely and unequivocally states a basic legal doctrine based on public policy and economic necessity, when their act could more easily be construed to limit the rights of creditors in a case where their rights were different from any given by any theory in common law and greater

than any in any similar or comparable situation created by statute, thus making them the same as in all other cases. It would seem, therefore, that a wife should have and still has by statute, free and clear from any claims of creditors, the proceeds of insurance purchased by annual premiums not in excess of five hundred dollars from the husband's property.

For years all creditors have had an absolute right to all proceeds of insurance for a wife purchased by annual premium payments in excess of five hundred dollars from the husband's property. The legislature has now limited that right. The statute gave a wife, free from all claims of creditors, a stated amount and confined creditors to any excess. The legislature has now given creditors the right to recover only the amount of premiums paid in fraud of creditors from the proceeds of the insurance. These two statutes taken together would appear to indicate that the first further qualified the second by saying that, in this particular case, their rights as creditors under the second, to recover premiums paid in fraud of creditors, would be further qualified by being limited to any surplus above the exempt sum.

The Crosney case refused to comment on the rights of creditors to recover premiums up to five hundred dollars paid in fraud of creditors. I can see no reason why the rule should not be the same as it is to premiums in excess of five hundred dollars. Section 55-a states the rights of creditors and section 52 states the fund against which these rights can be enforced. Therefore, the law would seem to be that creditors can obtain the amount of any premiums paid in fraud of creditors from the proceeds of insurance for a wife's benefit purchased by the payment of annual premiums in excess of five hundred dollars from the husband's property.

L. P. W.

IS BORROWER'S NEGLIGENCE IMPUTABLE TO OWNER OF AUTOMOBILE?

Section 59 of the Vehicle and Traffic Law was proposed by the legislators to solve the liability and disability middle which arose whenever a person other than the owner operated an automobile in a negligent manner. The good faith behind the statute is unchallenged. Its efficacy has been scored and contested. One of its latent phases is presented in the case of Gochee v. Wagner, (225 N.Y. 344). Does the statute, which makes the owner of an automobile liable for injuries resulting from negligence of any person driving it with his consent, also constitute such driver his agent so as to impute his negligence to the owner in all instances?

Mr. Gochee, the plaintiff, owned a Willys-Knight automobile. His home was a few miles outside the city of Rome. The plaintiff permitted his wife to drive the car to the city to get her mother. On the way home his wife stopped for the plaintiff at his father's house. The plaintiff sat on the rear seat intending to ride to his home. His wife was driving and her mother sat on the front seat with her. The car collided with that of the defendant. Mr. Gochee was injured and his car damaged. This suit was for personal injuries and damages to his car. In a series of special questions submitted to the jury, they found that Mrs. Gochee was negligent, that the defendant was negligent, that the plaintiff was free from negligence. The Appellate Division permitted a recovery by a three to two decision. The Court of Appeals decided unanimously for the defendant.

The two appellate courts although differing in result, interpreted the statute alike. The Court of Appeals in effect affirmed the prevailing opinion of the lower court, but found a basis upon which to impute negligence to the owner on common law principles. This latter contention was not submitted to the Appellate Division. Hence the case at bar presents a dual aspect of an auto owner's liability, statutory and common law. The discussion is in that respective order.

The pertinent provision of section 59 of the Vehicle and Traffic Law is: "Every owner of a motor vehicle ... operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle ....in the business of such owner or otherwise, by any person legally using or operating the same with permission express or implied, of such owner ...". This section was first added to the New York Laws in 1924, C. 534, as Section 282-e of the Highway Law. By New York Laws 1929, C.54, it was transferred to chapter 71 of the Consolidated Laws, known as the Vehicle and Traffic Law which contains present Section 59. Foreign states having similar statutes are Michigan, California and Iowa.

The question in issue then is: - Does the statute not only make the owner liable to third parties, but bar him from suit against them when his own driver has been guilty of contributory

negligence? Swarthout v. Van Auken, (132 Misc. 89), answered in the affirmative, but it was approved upon other grounds in 227 App. Div. (4th Dept.) in 1929. In Schuler v. Whitmore, (185 Misc.814), the Supreme Court in 1930, also answered in the affirmative. Both opinions and the dissent in case at bar are based on a strict adherence to the theory that the statute makes the driver an agent for all purposes, and point to such an interpretation of a similar statute by the Supreme Court of Iowa. (Secured Finance Co. v. Chicago R.I. & P.R.R., 27 Iowa 1105), interpreting Iowa Code (1924) Section 5026. Of interest is the fact that in Shuler v. Whitmore (supra), the owner, plaintiff, was a passenger in his car. In view of Judge Hubb's decision in the Gochee case, the plaintiff would have been barred on common law principles (post), but not by Section 59. (See also note on instant case of N.Y.V. Review 104, which adopts the same line of argument as the court of Iowa, i.e. that the liability created by the statute must have a corresponding disability.)

Our courts in the instant case answered the above certified question in the negative. Neither the word "servant" nor the word "agent" is used in the statute. In discussing the effect of Section 59, it has been said that the borrower occupies the relation of agent of the owner, and that the owner's liability for injury caused by the borrower's negligence is the same as it would have been if caused by an agent. (Psota v. Long I. R.R. 246 N.Y. 388). This was done for convenience of discussion only, since the damage done by the borrower is under the statute the measuring rod of the owner's liability. But the theory of liability is not predicated on a principal and agent relation. To substantiate this stand we submit, that at common law the owner of a vehicle was not liable for negligent injury caused by its operation by another, unless the driver was his agent and was acting within the scope of the agency. (Hersienbuttel v. Teagher, 162 App.Div. 752, affd. 221 N.Y. 511, (1917); Van Blaricom v. Dodgson, 220 N.Y. 111, (1917); Doran v. Thomson, 76 N.J.L. 754, (1907); Burdick, Law of Torts 4th Ed. Section 126).

In Plaumbo v. Ryan, (215 App.Div. 517,518). the purpose of the statute is stated to "prevent an owner from escaping liability by saying that his car was being used without authority, or not in his business". While the statute is remedial, it is remedial solely in favor of an injured third person. "The legislature may not be presumed to make any innovation upon the common law further than is required by the mischief to be remedied." (Psota v. Long I.R.R., supra p. 390). The liability of the owner and not of the third party was intended to be affected. The driver is not in fact the agent of the owner and the statute does not make him such. As stated in the prevailing opinion of the Appellate Division the statute, "is not to be wrenched out of its intended purpose and its language distorted to conform it to the conventional pattern of common law agency."

There is one further bit of evidence from which may be gleaned the intent of the legislators as to the effect of the statute. By Section 59, those engaged in the business of renting automobiles

and who carry liability insurance, insuring the borrower against liability arising out of his negligence„ are not bound by the statute. The section continues after the above quoted passage, "... provided, however, that any person, frim, association or corporation engaged in the business of renting or leasing motor vehicles to be operated on the public highway who carries or causes to be carried public liability insurance ... insuring the renter against liability arising out of his negligence ... shall not be subject to the provisions of this section". Hence, the pyrpose of the statute was merely to create a substantial party, the owner of the car or its equivalent, an approved insurance company, against whom third parties might proceed. The statute was intended to provide a surety to injured third parties in the absence of an agency relationship. For by expecting insurance, which enures to the third party, the firm is exempted from statute. The net difference being, who of two parties will be liable,- owner or insurer. If insurance is obtained, imputed agency under Section 59 cannot be said to arise, because the statute does not apply. Ergo, if the concern chooses not to effect insurance the only result is that it will be liable to third parties. In neither instance is a suit by the concern, as plaintiff, affected. The owner of a private car stands in the position of a firm engaged in renting cars, and which firm has not obtained insurance. At most it may be said that a quasi principal and agent relation is established only as to suits by a third party, but never when the owner is the plaintiff. The latter could recover before the statute. The statute does not alter an owner's action.

Section 59 makes the owner liable to third parties, but does not bar him from suit against them when his own driver has been guilty of contributory negligence.

From this point on the Court of Appeals proceeded to explain that under the particular circumstances, the plaintiff although not affected by the statute, nevertheless was barred from suit on common law principles.

The wife having permission to use the car, was a gratuitous bailee. Had the plaintiff not been in the car he could have recovered, since not barred by statute. But continues Judge Hubbs, "When the respondent entered the car, he regained dominion over it, and the rule applicable under the statute, in the absence of the owner, ceased to apply. It was respondent's car, he was present and had the legal right to control its legal operation, and the negligent conduct of the driver was imputable to him." Strangely, this statement is made without reference to any case to substantiate it. Therefore it may appear that the honorable Judge assumes as proven the legal principle to be proved. The writer was unable to find a single New York decision exactly in point. Nevertheless there are many cases which justify the principle enunciated by means of converse reasoning. "The negligence of the driver of a vehicle which contributes to an accident is not imputable to another person riding in the vehicle, unless that person had some right to control or influence the driver's conduct." (Bennett v. New York

C.R.R., 61 Hun, 623). Cases holding to the same effect are: Geary v. Metropolitan St. Ry.Co. 84 App.Div. 514, (affd. 177 N.Y. 535); Dyer v. Erie R.Co., 71 N.Y. 228; Meenagh v. Buckmaster, 26 App.Div. 451; Robinson v. Metropolitan St. Ry., 91 App.Div. 18; Ward v. Brooklyn Heights R.Co., 119 App.Div. 487, (affd. 190 N.Y. 559); Terwilliger v. Long Island R. Co., 52 App.Div. 78, (affd. 170 N.Y. 592).

In the last case, the decedent was riding in his father's carriage seated with the driver who was in the employ of the father. The judge charged the jury that the decedent was not responsible for any negligence of the driver. The Appellate Division sustained the charge with the following language: "The driver was not the servant of the deceased. There was no evidence that the driver was under the control and direction of the deceased so as to create the relation of servant and master. Where it is not shown that the driver was under the express control of the person using the vehicle, so that the driver was bound to obey orders given him, then it cannot be said that the negligence of the driver is imputed to the passenger."

This principle stated in 1903 is nevertheless applicable in case at bar. Herein Mrs.Gochee did upon entering his Willys-Knight assume such a control. The driver was subject to his every order. He could have told Mrs. Gochee to stop or go, to continue driving or quit. It is immaterial that he did not exercise these privileges. The driver being subject to such commands was only acting as agent of the owner, plaintiff. Hence the driver's negligence is imputable to plaintiff. Therefore, Mr. Gochee is by common law barred from suit.

G. M. S.

VARIOUS ASPECTS OF COUNTERCLAIMS.

Recoupment, set-off, counterclaim, like the three wise men, have come from afar off. Unlike the three wise men, they bear no gifts of frankincense and myrrh; their's are gifts of justice and fairness. Their path has been ever toward a definite goal - to make law practically applicable to the affairs of men, to require payment where it is due, not just as a matter of law, but actually as a matter of business; to end excessive litigation; to avoid circuitous recovery with its ever present hazard of actual loss through the insolvency of the person ultimately liable. The path they have followed is worthy of delineation.

In the beginning was recoupment. It is mentioned in the legal writings of the Fourteenth Century. The term was then limited to cases in which the defendant answered that he had paid part of the claim sought by the plaintiff, really no more than our present defense of payment. That did not accomplish much in the elimination of circuity of action. The debt that was the subject of the action was considered as completely separate from, and not subject to diminution by, any debt which the plaintiff owed to the defendant. Recognizing at once the logic of the rule but the practical necessity of its being otherwise, Parliament in 1729 and 1735 enacted statutes which allowed set-off. (2 George II c.22 and 8 George II c.24.) Set-off is a doctrine which allows a defendant, while, as Blackstone says, acknowledging the justice of the plaintiff's demand, to set up a demand of his own to counterbalance that of the plaintiff either in whole or in part. (Chases' Blackstone (3rd ed.) 776.) This demand to be set off must have been liquidated, numerically ascertained; it might have arisen out of a different contract than that on which the plaintiff sues, but of course must have been between the same parties. All this time, recoupment was still in judicial swaddling clothes. It was nearly 1800 before it reached its final common Law stature. The defendant could then diminish plaintiff's demand by a claim he had against the plaintiff, in certain cases. While set-off was usually confined to cases where the defendant's claim over against the plaintiff was liquidated, recoupment was allowed even though the claim was unliquidated. But if the claim arose out of a transaction distinct from that on which the plaintiff sued, it could not be used in recoupment; it was, however, the proper subject of a set-off. (7 Am.Law Rev. 789; Bouvier Law Dictionary 1 Student's Ed., p. 1034).

Obviously, there was no difference between the effect of recoupment and the effect of set-off. The choice of one rather than the other was dictated by the character of the defendant's claim and its relation to the plaintiff's. They were differently formed tools used to do one job. When our practice was revised in 1848, the Code of Procedure furnished a more efficient tool, combining the good points of both recoupment and set-off, having some few advantages all its own, and called "Counterclaim." (Deibert v. Dunn, 216 N.Y. 237). At the present time, then, all cases involving demands by the defendant against the plaintiff arise under our Civil Practice Act, which has in general, followed the Code provisions. Sections 266 and 267 are the pertinent ones.

> "A counterclaim *** must tend to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff or in a proper case, against the person whom he represents and in favor of the defendant.--
>
> 1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action.
>
> 2. In an action on contract any other cause of action in contract existing at the commencement of the action." (C.P.A., Sec. 266.)

We notice the restriction anent liquidated claims has been dropped. We see the doctrine of recoupment expressed in subd. 1, of set-off in subd. 2. We note the addition of a possible counterclaim against the plaintiff where he is the representative of the person primarily liable. Section 267 of the C.P.A. applies exclusively to cases arising under sub. 2 of 266, the old set-off doctrine. It greatly expands the class of cases to which set-off was applicable.

> "If the action is founded upon a contract which has been assigned by the party thereto -- a demand existing against the party thereto -- at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of assignment, must be allowed as a counterclaim to the amount of the plaintiff's demand, if it might have been so allowed against the party while the contract belonged to him." (C.P.A. Sec.267.)

As reference to "representative" did in 266, sub. 1, so this section 267 extends the effect of counterclaim to a cause of action held by persons, strangers to the original contract, claiming as assignees. This innovation is justified by a principle of substantive law. An assignee can take by assignment only so much as his assignor had. The claim while in the assignor's hands being subject to a counterclaim should not be freed therefrom by means of assignment alone. Really, in legal effect, the assignor owned, not the face amount of his claim, but that amount minus the counterclaim. "The assignee takes the chose in action subject to all *** counterclaims against the assignor, then held by the debtor." (15 Corpus Juris 763; Lawrence v. Cong. Church, 164 N.Y. 119; Green v. Darling, 10 Fed. Cas. 5, 765, 5 Mason 201.) If it were not for this doctrine the owner of a claim could assign it to a third person, squander the proceeds, render himself insolvent, so depriving any action against him of practical effect. But under this rule of law and the C.P.A. confirming it, the assignee bears the burden, rather than the creditor. The burden is on the buyer; he must still beware. That seems just; the purchaser buying with eyes open should suffer, not the creditor who had no control over the assignment and no means of warning the purchaser.

The effect of these statutes is that a representative takes subject to a counterclaim arising out of the same transaction.

(Sec.266, sub. 1.) An assignee takes subject to a counterclaim arising out of any other contract the assignor had with the defendant, which claim was due at the time of the assignment. The term "representative" as used in Sec. 266, sub. 1, includes an assignee or grantee. He "is a legal representative of assignor or grantor in regard to the thing assigned or granted." (Grand Gulf R.R. v. Bryan, 8 Smed. and M. (Miss.) 234; Lee v. Dill, 39 Barb. 516.)

This bit of history and statutory exposition equips us with the general knowledge needed to understand the cases that follow. Only three lines of decisions will be treated. There are others, important ones, for instance, those dealing with adaptability of the statute to claims against the plaintiff and third parties, or by some of several defendants against the plaintiff, or against the plaintiff and third persons. Seligman v. Friedlander, 199 N.Y. 373; Hopkins v. Lane, 87 N.Y. 50; American Guild v. Damon, 186 N.Y. 360; Carmody, N.Y. Practice, (Students' ed.) p. 283.) Also, those dealing with equitable set-off, allowing set-off even where the terms of the statute are not exactly satisfied, if some peculiar equity exists, as plaintiff's insolvency as absence from the jurisdiction, making the defendant's claim almost certain of defeat unless allowed in diminution of plaintiff's. (19 Encyclopedia of Pleading & Practice 718).

Having limited the field of discussion, let us get down to cases. In 1848, Wells owed Stewart $75. Wells bought notes made by Stewart, payable in two months, to the amount of $59. Two days after Wells bought these notes, Stewart assigned his claim to the plaintiff. Several months passed; then the assignee sued on the claim. Wells interposed a counterclaim on the notes, claiming they formed a demand existing against the party who assigned the contract to the plaintiff, and belonged to the defendant in good faith before notice of the assignment, so under the statute at that time, now C.P.A., Sec. 267, sub. 1, must be allowed as a counterclaim to the amount of plaintiff's demand. The court read the missing phases of that section of the statute into this claim and disallowed it. It was not a "demand existing at the time of the assignment," for the notes were not then matured, and it would not have been so allowed against the contract sued on while the contract belonged to the assignor. (Wells v. Stewart, 3 Barb. 40.) Apparently this case was not considered decisive by the profession. The same relative facts appeared in Michigan Savings Bank v. Miller (110 App.Div.670). The court held, in effect, that a defendant cannot counterclaim on a note made by the assignor which matured after the assignment to the plaintiff of the claim sued on. This is the same interpretation of the statute. In Meyers v. Davis (22 N.Y. 489) the counterclaim was on a contract performed by the defendant after assignment; in Martin v. Kunzmiller (37 N.Y. 396) the counterclaim was on a debt maturing after the assignment; in Newcomb v. Almy (96 N.Y. 308) the counterclaim was based on insurance policies maturing after assignment. In these three the same rule was applied. The counterclaim not existing as such against the assignor at the time of the assignment cannot be asserted against the assignee after it has matured.

The second line of cases also arises under the provision allowing a counterclaim on any contract cause of action existing agsinst the assignor at the time of the assignment, C.P.A. 266, sub. 2, 267, sub. 1. The rule applied is found suggested in Fuller v. Steighitz, (27 Ohio St. 355-361). The test of whether the debtor preserves his counterclaim depends on whether he could have set it up before the assignment; that is, while the contract belonged to the assignor". Judge Folger, in Coffin v. McClean, (80 N.Y. 560, 563), writes "nor is it (counterclaim) permitted except when the demands are mutual; that is where both were due and payable before the transfer to a third party." The rule so enunciated is applied as authority in Bradley v. Thompson Smith's Sons, (98 Mich. 449). Bradley was assignee of a completely executory contract with the defendant. The defendant had an accrued claim against the assignor, before the assignment. After the assignor performed the contract, the assignee sued for his rights accrued after the assignment. The defendant claims that, since the assignor could not have avoided the counterclaim if he had kept the contract, and since he could not convey a greater right than he had, the plaintiff must have taken subject to the right of counterclaim. But the court held that at the time of the assignment there was no claim on the contract. A fortiori there was no claim on the contract subject to counterclaim. Plaintiff's claim accrued after the assignment and could not be subjected to a counterclaim against the assignor.

Our Court of Appeals met a like situation in the case of Stafford Realty Co. v. Kremer, (258 N.Y. 1). That case is the nucleus of this article. It presents a set of facts new in our appellate courts so far as can be ascertained. The plaintiff is the assignee of the defendant's landlord. When the plaintiff was assigned the leasing contract, defendant owed no rent. Rent was payable in advance, so defendant neither owed rent, nor had he had any possession under the lease, subject to later payment. The defendant, however, had an accrued contract claim against his landlord, completely independent of any claims on the assigned lease. This he set up as a counterclaim to an action brought by this plaintiff, assignee of the leasing contract, as soon as rent accrued after the assignment. The defendant states that he has a claim which existed against the assignor at the time of the assignment, and which would have been a counterclaim to any contract cause of action brought by the assignor against him before the assignment. This, defendant insists, satisfies the wording of Sub. 1 of Sec. 267 of the C.P.A. "In an action by the assignee of a contract *** a demand existing against a party thereto at the time of the assignment thereof *** and belonging to the defendant in good faith before notice of the assignment, must be allowed as a counterclaim to the amount of the plaintiff's demand, if it might have been so allowed against the party while the contract belonged to him." The force of this argument is considerable. It caused the Appellate Division to hold for the defendant, reversing the Appellate Term. (232 App.Div. 265.) The revisers of Carmody's invaluable work on Practice adopt the decision of the Appellate Division as a correct application of the law to the case. (Carmody's N.Y.Practice (Student Ed. 285). But the defendant's argument was given little weight by the Court of Appeals. Chief Judge Cardozo wrote the opinion, one of the last of those which illuminate so many of the obscure corners of our legal structure. He details the evil effects

of defendant's contention, the harshness of its effect on the assignee, his inability to collect rent, perhaps for years, because his tenant owed a cause of action against his assignor, "the clog on the free alienation of land" this would surely accomplish. Then he looks to the words of the statute; granting that the defendant's demand existed against the assignor at the time of the assignment, and that it would have been a counterclaim to any contract cause of action brought against the defendant before assignment. Would it have been a counterclaim that would"have been so allowed" against the assignor. Substituting for the word 'so', its opposite phrase "to the amount of the plaintiff's demand" the clause will read - must be allowed as a counterclaim if it might have been allowed as a counterclaim to the amount of the plaintiff's demand against the assignor while the contract belonged to him." But the plaintiff's demand did not exist while the contract belonged to the assignee; the assignor had no right of action on the contract, for the defendant had paid his rent as it fell due. A counterclaim to the amount of a demand cannot be imagined while there exists no demand on that contract. To think of a counterclaim against a person without a cause of action in that person is as obviously silly as to think of a reflection in a mirrorscans any object in front of it which could be reflected. There was no claim on the contract when it was assigned; there can be no counterclaim against the assignee when he sues on a later accrued claim. The ancient distum in 27 Ohio St. and 80 N.Y. is adopted. Our rule is identified with that of Michigan. It is based on a broader foundation, however, than just that statutory quirk detailed above. That no doubt, logically justifies the decision, but Judge Cardoao says, not just because there was no right to sue at the time of assignment is the counterclaim denied, but because there was also no actual possession under the assignor's rights in the lease, no "generative transaction out of which a cause of action might ultimately be born." He does not hold that mere lack of a technical cause of action at the moment of assignment would suffice. That point is left undecided. He does hold that where neither the cause of action exists, nor the consideration out of which a cause of action will later accrue, has gone to the defendant before assignment, the defendant may not counterclaim a cause of action in contract accrued prior to the assignment.

That is the second class of cases. The point of law is tiny but its consequences obviously could be infinite. To further allocate its effect, a discussion of a third line of cases is needed. Under C.P.A., Sec. 266, sub. 1, "a counterclaim must be one of the following causes of action against the plaintiff, or in a proper case, against the person whom he represents, and in favor of the defendant: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action." A corporation had a partly executory contract with Dunn. It assigned a claim for money due thereunder to Seibert. The Corporation failed to perform the rest of its contract. Seibert sued Dunn for the amount of the claim assigned to him. Defendant counterclaimed for damages accruing out of the corporation's breach of the contract after the assignment to Seibert. Seibert confidently replied to the counterclaim that it did not arise before the assignment and so could not be good as against the assignee. (C.P.A.267,

sub. 1). But the court in Seibert v. Dunn (216 N.Y. 237) showed that sub. 1 of sec. 266 applied verbatim. That this counterclaim was a "cause of action arising out of the transaction set forth in the complaint", not a separate action on contract. Seibert, under the definition supra, was the corporation's representative. The assignment to him was of only what the corporation had and any rights the corporation has in the contract were subject to the rights of Dunn to exact damages for its non-performance. Seibert's rights were necessarily subject to the same right of counterclaim. (Carmody, N.Y.Practice (Students' Ed.) p. 289 contra holding this a case of equitable recoupment). Such widely distributed authorities as Rockwell v. Daniels (4 Wis. 432), American Bridge Co. v. v. Boston (202 Mass. 324), and Gov't of Newfoundland v. Newfoundland R.R.Co. (15 App.Cas. 199) agree with Seibert v. Dunn. "The right of the defendant to recoup in case the plaintiffs should fail to perform their contract was the law of the transaction from its inception." (Rockwell v. Daniels, supra). It is an implied term of the assignment, in effect, an inchoate diminution of the claim, consummating on the subsequent breach.

Three cases have been discussed. In the first, the defendant's claim had not accrued till after the assignment. In the second the plaintiff's claim had not accrued at the time of the assignment. In the third the defendant's claim had not accrued at the time of the assignment, but it arose from the same contract. The first two hold that before a demand may be used as a counterclaim to an assigned claim, both demand and claim must have accrued at the time of assignment. (C.P.A. 267, sub. 1.) The third holds that the claim may be asserted against an assigned claim even tho accrued after assignment if it arose out of the same contract. (C.P.A. 266 sub. 1). Thus the Stafford case fills a gap in the law of counterclaim. One more speculation is removed from the Practice Act.

G. R. B.

THE SITUS OF PERSONAL PROPERTY FOR THE PURPOSE OF TAXATION.

"We will suppose a man lived in Oregon and took a flyer in oil stock. The oil company was organized in Illinois, and had some of this Arkansas oil land *** we will suppose he made money *** and left a couple million dollars (in stock) to a friend. What happened? The federal government took ten per cent and more; Oregon took thirty-five per cent, Illinois took thirty per cent, and Arkansas thirty-two per cent of the total. That makes 107 per cent of the total that was taken in taxes". (Quoted at 28 Col. L. Rev. 807 from speech by W.B.Belknap at the 14th Nat. Conference, Nat. Tax Assn., 1921.)

This quotation serves to illustrate graphically, though with some exaggeration, the problem of multiple taxation. No further argument is needed to show that multiple taxation in any form is both a handicap and a practical injustice. In the field of transfer and inheritance taxes it has been a serious burden on many estates. This condition is born of the unquenchable thirst of the states for revenue and the lack of a rule for determining definitely the taxable location of movable property. The seriousness of the situation has led to a concerted effort by the Supreme Court of the United States to obviate the injustice by producing a rule which would fix the situs of personal property within the jurisdiction of only one state at a given time.

It is fundamental among the principles of taxation that the right to tax depends upon jurisdiction over the subject taxed. This is true whether the tax sought to be imposed is an inheritance tax or a property tax. (Matter of Estate of Swift, 137 N.Y. 77.) Apparently physical power is essential to jurisdiction over property. (Pennoyer v. Neff, 95 U.S. 714.) When property has tangible form, power of control and location coincide, but when property is intangible, the element of location is absent and power of control alone constitutes the basis of jurisdiction. The place where the power of control which gives jurisdiction can be exercised is the situs of the property. (C.E.Carpenter, Jurisdiction over Debts, 31 Harvard L. Rev. 905.) Control over property is essential, also, because of the theory which prevails in this country that the right of the State to impose a tax rests upon the existence of a service or benefit rendered as an equivalent for the tax exacted. "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares." (Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 202.)

It should be noted at this point that problems raised by the Uniform Stock Transfer Act are not within the province of this discussion. This act has been adopted by twenty-one states, including New York, and imposes a tax on all sales, agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock in any domestic or foreign corporation. (N.Y.Laws of 1909, Chap. 62; Tax Law, Art.12, sec. 270.)

In this state the payment of the tax is denoted by adhesive stamps affixed in a manner adapted to the circumstances of the sale. The right to impose the tax does not depend on jurisdiction over the property transferred. It is not a tax on property, but on the sale of property, or on a particular kind of contract made within the state. Any state may impose a stock transfer tax in which any act essential to the transfer of title is performed. Jurisdiction arises from the principle that a state has power to tax all business done and all contracts made within its territory, provided they are not protected by the Federal constitution, whether the business is done or the contracts are made by residents or non-residents. (People ex rel. Hatch v. Reardon, 184 N.Y. 431; R. Pomerance, the 'Situs' of Stock, 17 Cornell L. Quarterly 45.)

The determination of the taxable situs of real property presents no difficulty. Real property, whether corporeal or incorporeal, has a permanent location definitely within the territorial jurisdiction of one state only. That state alone may tax such property and its taxation by any other state deprives the owner of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution. (Louisville and J.Ferry Co. v. Kentucky, 188 U.S. 385.)

Legal rights in and jurisdiction over personal property were determined at common law by applying the principle, mobilia sequuntur personam. This ancient maxim was the outgrowth of conditions which have now largely ceased to exist. Personal property then consisted chiefly of articles appertaining, as the name indicates, to the person of the owner, such as gold and silver, jewels, apparel, and, less immediately, horses, cattle and other animals, and the products of the farm and the shop. Such property was kept under the personal supervision of the owner, if not actually carried about with him. It was, therefore, logical to hold that the locality of personal property was determined by the domicile of the owner and that his rights with respect to such property were fixed by the law of that domicile. Despite the change which has since occurred in the form, variety, value, and distribution of personal property, mobilia sequuntur personam is by no means an obsolete rule. (Eidman v. Martinez, 184 U.S. 578.)

It is apparent that, as rules for determining the right to tax personal property separated from its owner, the mobilia maxim and the protection principle give different results. If a corporation domiciled in Illinois owns railroad cars in Pennsylvania, the maxim would permit Illinois to tax it in relation to such property upon the theory that ownership inheres in the corporation in Illinois. But, certainly the property is within the territorial jurisdiction of Pennsylvania and is protected by Pennsylvania law. The dominion of Pennsylvania over the cars is as complete while they are there as is its dominion over an acre of land situated in the state. Consequently, it was recognized that for the purposes of taxation "personal property may be separated from its owner; and may be taxed on its own account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax". (Pullman's Car Co.v.

Pennsylvania, 141 U.S. 18; New York Central R.R.Co. v. Miller, 202 U.S. 584.) Thus, we have two states on distinct theories taxing the same property at the same time. "No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. *** But these inconsistencies infringe no rule of constitutional law." (Blackstone v. Miller, 188 U.S. 189.) And so, multiple taxation is born.

Apparently the Supreme Court immediately recognized the injustices of multiple taxation because, two years after deciding Blackstone v. Miller (supra) they selected one of the two inconsistent theories and discovered constitutional grounds for rejecting the other. Tangible personal property is visible, easily found and difficult to conceal, and a tax is readily collectible at its situs. The dominion and protection exercised over tangible personalty by the state of its situs is an obvious fact. Mobilia sequuntur personam is a mere fiction created to promote convenience and justice in the administration of the law. When it has become an obstacle to both convenience and justice it should be promptly discarded. The adoption of a general rule that tangible personal property in other states may be taxed at the domicile of the owner involves possibilities of an extremely serious character. For example, the enormous mass of personal property belonging to a railroad company might under this rule be taxed in the state where it was incorporated, though its charter contemplated the construction and operation of roads entirely outside such state and when it is in no other particular subject to the laws or entitled to the protection of that state. Obviously, the mobilia maxim should be discarded in so far as it concerns tangible personalty. But what legal foundation can there be for doing so? The court reverted to the due process rule previously applied to unauthorized taxation of real property. If the state of comicile is in no position to protect and benefit the taxpayer and his property, but such property is wholly within the taxing power of another state to which it looks for protection, taxation within the domicile of the owner is beyond the power of the legislature and is a taking of property without due process of law. Thus may be paraphrased the reasoning of the Supreme Court in Union Refrigerator Transit Co. v. Kentucky (199 U.S. 194), decided in 1905.

The present rule is stated thus in the leading case on the subject: "As respects tangible personal property having an actual situs in a particular State, the power to subject it to state taxation rests exclusively in that State, regardless of the domicile of the owner." "The jurisdiction possessed by the State of the situs was not partial but plenary, and included power to regulate the transfer both inter vivos and on the death of the owner, and power to tax both the property and the transfer." (Frick v. Pennsylvania, 268 U.S. 473, 489, 492.)

It will be noticed that the rule just quoted is explicitly limited to tangible personalty. It has no application to the more important subdivision of personal property termed intangibles and including such items as debts, bank accounts, negotiable instruments mortgages, corporate bonds and stock and partnership interests.

The inconsistencies noted among the cases on tanbigle personalty are multiplied to confusion among the cases on intangibles. The pronouncements of the Supreme Court of the United States upon this portion of the law of taxation possess at least one characteristic of Holy Writ. They can be quoted on all sides of all phases of the problem. For the purposes of this discussion the trend of judicial reasoning will be sketched from a few of the leading decisions of the Supreme Court only. A more detailed account can be found in the annotations of the American Law Reports under the following citations: 42 A.L.R. 327, 364, 378, 413; 65 A.L.R.1008; 72 A.L.R. 1310.

The first question as to intangible personalty is: Can we apply the ryle already stated as applicable to tangibles? Can debts, bonds, and bank accounts be said to have such a situs of their own distinct from the domicile of the debtor or the creditor as will justify another departure from the old maxim, mobilia sequuntur personam. Certain obvious distinctions exist between tangible and intangible property. The latter can be held secretly. It is not visible and there is no means by which its existence and value can be ascertained in a jurisdiction apart from the debtor or the creditor. It may be said that debts are almost invariably reduced to written form. But the writing cannot be taxed. The writing is not property. It is merely convenient evidence of the debt wherever it is actually held or deposited. If the writing is destroyed, the debt, the right to demand payment, remains. Practical considerations seem to make adherence to the mobilia maxim necessary. So, it has been held that when a resident of New York loaned money to residents of Ohio, receiving therefor notes secured by mortgages on lands in Ohio, and deposited them with an agent in Indiana in order to escape taxation in Ohio, the debts had no such situs in Indiana as to give that state jurisdiction to tax them. (Buck v. Beach, 206 U.S. 392.)

Having determined that the taxable situs of intangible personalty is to be determined by domicile, at whose domicile is it to be taxed, at that of the debtor or at that of the creditor or at both? In the earlier cases considerable doubt was expressed that a debt could be said to be property of the debtor in any sense. It is an obligation of the debtor and possesses value only in the hands of the creditor. To call debts property of the debtors is simply to misuse terms. All the property there can be in debts in the nature of things belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. (State Tax on Foreign-held Bonds, 15 Wall. 300.) But this doubt was dispelled by the ill-starred decision in Blackstone v. Miller (supra). A testator died domiciled in Illinois owning a debt due from a New York firm and a sum of money on deposit in a New York trust company. Illinois taxed the transfer by will of the entire estate. Then New York sought to impose an inheritance tax on the transfer of the property just mentioned. The court held such tax by New York to be valid. Illinois might tax under the mobilia maxim, and certainly the protection principle conferred jurisdiction to tax upon New York. The deposit could never be transferred nor the debt collected without dependence upon New York process and resort to the New York courts. New York protected and practically gave validity to both

items of property. (Followed in Bullen v. Wisconsin, 240 U.S.625; Citizens' Nat. Bank v. Durr, 257 U.S. 99; Blodgett v. Silberman, 277 U.S. 1.)

Thus, it will be observed that the hardship and injustice of multiple taxation, which was removed from tangible personalty in 1905 by the Union Transit Co. case, persisted at this point as to intangible personalty. Certainly such a discrimination against intangibles was without basis in logic or justice. But not until 1929 did the Supreme Court see fit to remove the burden by declaring the mobilia maxim to be the exclusive test to determine jurisdiction to tax intangibles and by using the due process of law argument to destroy the application of the protection principle. In that year the Court, in a forceful decision which has become the leading case on this phase of the law, explicitly overruled Blackstone v. Miller (supra) in so far as it indicated that a chose in action can be taxed at both the domicile of the debtor and the domicile of the creditor without conflict with the Fourteenth Amendment. (Farmers' Loan and Trust Co. v. Minnesota, 208 U.S. 204.) In this case the Court actually reverted to the belief originally expressed in State Tax on Foreign-held Bonds (supra) that a debt does not constitute taxable property in the hands of the debtor. The foundation of the opinion, however, is in practical justice rather than legal theory as is indicated by the following quotation:

"While debts have no actual situs we have ruled that a State may properly apply the rule mobilia sequuntur personam and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago Union Refrig. Transit Co. v. Kentucky (supra) declared: ' *** in view of the enormous increase of such property (tangible personalty) since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for the purpose of taxation, and correlatively to exempt (it) at the domicile of the owner.' And, certainly existing conditions no less imperatively demand protection of choses in action against multiple taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for

saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota." (pp. 221-212.) (Followed in Baldwin v. Missouri, 281 U.S. 586; Beidler v. South Carolina Tax Com., 282 U.S. 1.)

It will be noted that the cases to which we have referred mention corporate stock rarely and discuss exclusively such choses in action as debts, bank credits, and bonds. Obviously corporate shares in the hands of a stockholder are intangible personal property. Therefore, the state wherein the stockholder is domiciled has jurisdiction to tax such property by reason of the mobilia maxim applied to intangibles generally. (Hawley v. Malden, 232 U.S. 1.) However, certain obvious distinctions exist between debts and stock. Stock does not represent a debt of the corporation, but an interest in dividends declared and a proportionate share in the net assets upon dissolution of the corporation. But a stockholder is not a part-owner of the property of the corporation. The fact that a foreign corporation owns property in a state and is authorized to do business there does not give that state the right to tax the possession or transfer of stock owned by a non-resident stockholder. (Rhode Island Trust Co. v. Doughton, 270 U.S. 69.)

Stock has been for many years subjected to multiple taxation upon the theory that, though it followed the domicile of the owner as intangible personalty, it was such an interest in the corporation as to constitute property in the state of incorporation. (Corry v. Baltimore, 196 U.S. 466; Matter of Fitch, 160 N.Y. 87.) The Supreme Court was recently given an opportunity to correct that situation by extending to stock the rule of immunity from taxation by more than one state already enunciated as to debts. (First Nat. Bank of Boston v. Maine, U.S. 1932, 52 Sup.Ct.Rep. 174, 76 L. Ed.211.) Recognizing the inherent differences which exist between debts and shares of stock, the court decided, however, that these differences do not justify a holding that multiple taxation is constitutional as to stock and unconstitutional in relation to other intangibles. The considerations which justify the application of the fiction embodied in the mobilia maxim to bonds, certificates of indebtedness, notes, credits, and bank deposits apply with equal force to shares of corporate stock. In each case there is wanting on the part of a state other than that of the owner's domicile any real taxable relationship to the property or the transfer which is the subject of the tax. "We consider that shares of stock, like other intangibles, constitutionally can be subjected to a death transfer tax by one state only." (p. 216.)

But the court explicitly excludes from this holding the right of the state of incorporation to tax the transfer of stock on the books of the corporation and the issuance of a new certificate to take the place of the old. Jurisdiction to impose such a tax "flows from the power of the state to control and condition the operations of the corporation which it creates." (p. 218), and is not dependent

upon power to control the actual property.

To the principles which the Supreme Court has stated in its effort to obviate multiple taxation and to produce a workable rule for fixing the taxable situs of personal property, one apparent exception exists. A line of cases establishes the principle that when the owner of intangible personal property embarks upon a business enterprise with it in a foreign state, such property acquires a "business situs" in the state where used which will subject it to taxation there. (New Orleans v. Stempel, 175 U.S. 309; De Ganay v. Lederer, 250 U.S. 376; Safe Deposit and Trust Co. v. Virginia, 280 U.S. 83.) To illustrate: A New York insurance company made a practice of loaning money to its Louisiana policy holders on the borrowers' notes secured by their policies as collateral. Both the notes and policies were forwarded to the home office in New York. When a note became due it was sent to the company's agent in New Orleans for collection. Louisiana sought to tax these debts as credits arising from business done in that state. The tax was sustained by the Federal Supreme Court. "Here the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the State. The notes and securities were in Louisiana whenever the exigencies of business required them to be there. Their removal with the intent that they should return whenever needed, their long continued, though not permanent absence, cannot have the effect of releasing them as the representatives of investments in business in the State from its taxing power ***. We are not dealing here merely with a single credit or with a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the State of Louisiana, and employed a local agent to conduct that business." (Metropolitan Life Ins. Co. v. New Orleans, 205 U.S. 395, 402-403.)

In conclusion, the following rules may be culled from the cases which have been referred to:

1. A state cannot, without denial of due process of law, tax the possession or inheritance of tangible personal property permanently located in another state.
2. Under ordinary circumstances intangible personal property has its situs for taxation exclusively in the state in which the owner (in the case of debts, the creditor) is domiciled.
3. The owner of intangible personalty may so deal with it as to give it a situs for taxation in a state other than that of his domicile by investing the property in business in that state.

A. H. P.

CURRENT DECISIONS

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NEGLIGENCE - VEHICLE AND TRAFFIC LAW, SECTION 59 - OWNER'S LIABILITY.

The enactment of section 282-e of the Highway Law (now section 59 of the Vehicle and Traffic Law) in 1921 caused a decisive change in the common law liability of the owner of an automobile which resulted in varied and conflicting decisions by the courts of this state.

Prior to the enactment of this section, the law was that an owner was not liable for the negligence of a person to whom he had loaned his car, whether that person were a member of his family, a servant on a personal errand or a stranger. (Potts v. Pardee, 220 N.Y. 431; Van Blaricorn v. Dodgson, 220 N.Y. 111). The Legislature by this statute changed that law by imposing liability upon the owner of every motor vehicle for death or personal injuries "resulting from negligence in the operation of such motor vehicle ... by any person legally using or operating the same with the permission, express or implied, of such owner."

Its constitutionality was readily upheld under the police power of the state for the protection of its citizens. (Feitelberg v. Latuson, 124 Misc. 595.)

The question which first troubled the court was whether this statute protected persons riding as guests of the driver. The case of Cohen v. Neustadter, (247 N.Y. 207), in reversing 221 A.D. 102, held that the statute drew no distinction between a guest of the driver and persons otherwise using the highway and that therefore liability would be imposed on the owner where the guest was riding with his assent. It was later held that no knowledge or assent of the owner was necessary. (Amann v. Thurston, 133 Misc. 293).

The liability was extended to cases where the borrower permitted another to drive in his stead tho such might have been illegal or forbidden (Grant v. Knepper, 245 N.Y. 158), but not where he loaned the car to another (Owen v. Gruntz, 216 A.D. 19), even though there were no instructions forbidding it. (Katz v. Wolf & Reinheimer 129 Misc. 384).

Limitations were first just on this liability, by permitting the owner of the car to put restrictions on his permission in Fluegel v. Coudert (244 N.Y. 393), wherein the driver, having received express instructions to take the car to the garage, was on his way home at the time of the accident, which took him in a direction away from that leading to the garage. Subsequently, an owner was absolved from liability where she had instructed her chauffeur not to invite strangers to ride in the car, (Psota v. Long Island R.R.Co., 246 N.Y. 388), and where a father forbade his son to take the car into New York City. (Chaika v. Vandenberg, 252 N.Y. 101).

This trend of opinions was checked by the recent case of Arcara v. Moresse (258 N.Y. 211) which suggested this report. Therein the owner loaned his car to his nephew with express instructions not to let one Barone, or any person other than himself, drive or operate the vehicle. At the time of the accident the nephew was in the car, but it was being driven, with his permission, by Barone who was negligent. The owner was held liable even though the nephew was not negligent except as the acts of the driver were his on the principal that he was at the time of the accident "using" the car. The court distinguished between a restriction on the use and one which relates to the manner of operation. The former, if reasonable, will free the owner from liability, while the latter will in no event do do, since, although the instructions relating to the operation of the car be disobeyed, nevertheless, it is such a use with "permission" of the owner as satisfies the statute.

What is a reasonable restriction on the "use" remains undecided. Following a suggestion in the instant case, a violation of an instruction that Barone should not be accepted as a guest might be such an employment for a proscribed purpose as would not be a permitted use and thereby relieve the owner of liability. This, as well as the cases which permitted similar instructions, is a narrow construction of the statute. The intent of the Legislature was to prevent the owner from escaping liability by saying that his car was being used without authority, or not in his business. (Plaumbo v. Ryan, 213 A.D. 517). The instant case, in preventing the owner from escaping liability by putting a restriction on the manner of operation of the car, is a step toward compliance with this intent.

It seems that a better interpretation of the statute would hold sufficient a general initial permission, placing upon the owner, who chooses to allow the use of an automobile, the risk of what is often an easy departure from limitations placed upon his permission. Moreover, such a position would eliminate from the statute as now interpreted, an invitation to perjury.

H. A. L.

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FIRE INSURANCE - ALTERATION OF RISK.

That a contract of insurance is one requiring the highest degree of good faith between the parties thereto all the cases and texts agree. However, it has been said in a leading case that "this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contracts in which one of the parties is supposed to be necessarily less acquainted with the details of the subject of the contract than the other." (Gates v. Madison County Mut. Ins. Co., 5 N.Y. 469,474.) Of course it is true that in the ordinary business transaction the absence of actionable fraud meets the requirements of good faith. Generally speaking, a person is entitled to the benefit of the best bargain he can drive. What degree of fair dealing is necessary to

make valid an insurance contract is a question which goes to the very root of a great portion of the law on that subject. It is familiar that a policy of marine insurance, from the very nature of the agreement, will be avoided for slight cause. Life and fire contracts are in a somewhat different category, but even here it should be said that the latter might be valid with a degree of confidence which would not satisfy the former.

Following are the material facts of a recent case, at once both novel and instructive, wherein the application of the doctrine of uberrimae fide: was in part at issue: Plaintiff's assignors were insured against fire in the plaintiff and defendant companies. On Sept. 4, 1929 the defendant issued a policy which was to take effect at noon Sept. 7, 1929. A fire occurred, plaintiff paid the loss and took an assignment of the insured's rights against the defendant. It appeared that a fire started a few minutes before noon on Sept. 7th on premises adjoining the building insured by the policy in question. It was about twenty-five minutes after noon when the fire reached the insured premises. The defendant contended that the increased risk, which concededly obtained before noon, prevented the policy from attaching. No merit was found in this argument and plaintiff recovered. (Springfield Fire and Marine Ins.Co. v. National Fire Ins. Co., 51 Fed. (2d) 714.)

It should be noted at the outset that the court, thanks to the unusual facts, could find for the plaintiff and yet not decide the main contention of the defendant, which was that there was a duty on the insured to inform the company of the increased risk. But here the situation was such that the insured could not possibly have reached the Company with the information before noon. The Court took notice of this and could treat the case as though the duty as claimed by defendant did exist. When no proof is made to the contrary, it was held, a duty impossible of performance under the circumstances will be treated as performed.

But the inquiry remains: If the insured could have informed the Company of the increased risk before the time the policy was to attach, would the failure to do so have avoided the policy? It is submitted that under sound principles of law and from the reasoning of analogous cases, the question is correctly answered in the negative. An opposite conclusion is sought to be justified on the authority of those numerous cases of which Goldstein v. New York Life Insurance Co. (176 App.Div. 815, affirmed 227 N.Y.575.) may be taken as an example. An applicant for life insurance, after submitting to a medical examination by the insurance company, was informed by his own physician that he was in a state of health which required a serious operation. He afterwards accepted the policy without making known to the company the discovery as to the state of his health. It was held that such omission to inform was a fraud on the insurer and there could be no recovery on the policy. The court endorsed what was said in Equitable Life Assur.Socy. v. McIlroy, (83 Fed.Rep. 631), "when the representation of good health and the certificate of the surgeon have been made and the contract is not immediately closed, but negotiations for it continue, ****

the representation and certificate continue and condition all the proposals and the ultimate contract, when it is closed. ******* The nature of this contract, the insurance of a man's life, **** imposes upon him the duty of disclosing to the company every fact material to the risk which comes to his knowledge at any time before the contract is finally closed."(Underlining ours.)

The cases last cited differ from the instant case in the main respects. In the first place, they concerned life insurance. But it is the other dissimilarity that is here sought to be emphasized, the time at which the insured was guilty of the concealment. In the former cases that time was before the contract was complete, while in the latter the concealment was after the agreement was closed. The distinction is not small. Nothing could more favorably appeal to one's idea of fairness than to say that an application should speak the truth as of the time of closing the agreement. It is quite another thing to say that a situation arising after the contract is closed but before it is to be effective will change the position of the insured to his disadvantage. Conceding that this might be so in life policies, there seems to be no reason either in law or common sense which would require it when the insurance is against fire and the premises are open to the equal inspection of both parties. To say that after an insurance company has accepted a risk, it must stand on its contract is not saying too much. By appropriate words an insurer can state to what it agrees. If it elects to remain silent, the contract should be enforced according to its letter.

There are cases which substantiate the position taken above. For example, an application, which contained the true statement that no proceedings had been commenced to enforce a mortgage, was forwarded to the company which some time later approved and issued the policy on the same day. The agreement was that "commencement of foreclosure proceedings . . . shall immediately render this policy void." Such proceedings were commenced after the receipt of the application but before the issuance of the policy. No such action was taken after the contract was completed by delivery. The decision of the court was that the policy was valid. It will be noted that the application showed that no foreclosure proceedings had been commenced. It contained no promise that they would not be begun thereafter. Likewise, the policy said that such action would in the future avoid the insurance. Therefore proceedings in the interim were held to be within the rights of the insured. By neglecting to issue the policy promptly the company lost the protection which earlier action would have assured. (Day v.Hawkeye, 72 Iowa 597.)

In another case a policy was delivered eight or ten days in advance to take effect at noon Oct. 31, 1917. At 11:06 A.M. on that day a fire started and burned for some time. The firemen left at 2 P.M. At 7 P.M. of the same day fire again broke out. In an action to recover for the loss occasioned by the seven o'clock fire, the court held, in the first place, that if the fire was a continuation of the first there could be no recovery, under the doctrine that a damage begun is a damage done. But it was quickly

added that, unless the second fire was immediately and continuously, in the broad sense of the terms, connected with the first, it could not be regarded as a part of it. This significant remark was made: "The object of the parties to the contract was to insure and in considering the subject we must not lose sight of this and where by reasonable construction, we can lend our aid to the accomplishment of this purpose, we should do so." The material change in the risk brought about by the fire which stated at 11:06 A.M. was little more than mentioned. The court disposed of the proposition by saying, "Unusual circumstances arising do not relieve the company from the obligation of its contract. When a future date is fixed on which a contract is to be operative, the parties must run the risk of conditions changing and thus affecting the situation when the term begins." (Saul v. N.W. Ins. Co., 79 Pa. Super. Ct.522)

It is interesting to note that the case here reviewed is directly in line with Rochester German Ins. Co. v. Peaslee Gaulbert Co. , (120 Ky. 752), wherein the converse situation was disclosed. A policy insured goods in a warehouse until April 1, 1902. It was held that the defendant was not liable for a loss which was inevitable at the time the policy expired, provided the fire had not then attacked the warehouse. To hold otherwise in either case could only be done by enforcing a condition not agreed to. Even-handed justice seems to be reached for both the insurer and insured by a rule that so nicely works both ways. Neither can complain.

It might be added that had the fire in the instant case attacked the insured premises before noon and continued thereafter, no recovery at all could have been had under the rule that a loss will be deemed complete as of the time of its commencement, or, as stated above, a damage begun is a damage done. At least both the Saul and Peaslee Gaulbert cases (supra) are to this effect. There seems to be a very obvious distinction between a loss threatened and a loss actually started. Evidently, only the latter is covered by the policy. To lay down any rule is difficult, but perhaps it is safe to say that in controversies involving fire insurance contracts, once they have had a valid inception, the parties thereto will be bound by their agreement, unhampered by considerations of good faith, which no doubt earlier in their negotiations were important. From then on, at least, they deal at arms length, each agreeing to submit to what is then unknown to both.

H. S. V. S.

* * * * * *

PARTNERSHIP - COMPENSATION FOR SERVICES.

"One question which has been the subject of as much controversy and litigation as any other in partnership relations, is whether or not a partner is, in the absence of agreement therefor, entitled to compensation rendered to the firm." (1 Rowley, Modern Law of Partnership, sec. 350.)

One of the first cases in the English common law which treated

of this problem was Thornton v. Proctor, (1 Anst. 94; 145 Eng. Rpnt. 810) handed down in 1792. Here plaintiff and defendant were partners in the wine trade. Both partners lived in the same house wherein the business was carried on and entertained their customers jointly. Later one moved to another residence, and the whole expense of entertainments ("which was found to be necessary in that trade") fell upon the one remaining. He seeks to recover for expenses and services. The court held that there could be no recovery because there was no agreement for such an allowance.

Burden v. Burden (1 Vesey & Bea. 170; 35 Eng. Rpnt. 67) decided in 1813 held a surviving partner was not entitled without express stipulation to any allowance for his time and labor for carrying on the trade after deceased partner's death.

Turning to the development of the law in New York in this particular situation we find Franklin v. Robinson (1 Johns. Ch.157) decided in 1814 to be among the earliest. Here the court held that joint owners, or partners, are not entitled to charge each other for services rendered in the care and management of the joint property, unless there is a special agreement for that purpose.

Four years later there was handed down the case of Bradford v. Kimberly (3 Johns. Ch. 431). Chancellor Kent stated as dicta,

> "In the case of joint partners, the general rule is that one is not entitled to charge against another, a compensation for his more valuable or unequal services bestowed on the common concern, without a special agreement; for it is deemed a case of voluntary management." (p. 433.)

Then on May 5, 1919, The New York Partnership Law was enacted. (Laws of 1919, Chap. 408). Article 4, sec. 40, subd. 6 states:

> "6. No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."

As a final word upon the subject we have the recent case of Levy v. Leavitt (257 N.Y. 461). Plaintiff and defendant by oral agreement entered into partnership to sell a quantity of bacon. Defendant was to dispose of the same and in order to do so went to and travelled through Europe seeking a purchaser. Upon the accounting defendant was denied the right to charge as an expense the reasonable value of any services rendered. The Court found that such services were extraordinary but as there was no agreement, express or implied, to compensate for the same, the defendant could not charge the value of said services against the plaintiff.

In conclusion, there must be an agreement to compensate for services, for in the absence thereof the profits are the reward for services rendered. This agreement may be express or implied. If

express it is easily ascertained. To be implied, there must be an inference from the relations of the parties and the circumstances of a promise of compensation, and if the services were to be rendered voluntarily and without reasonable expectation of payment the basis of such inference is lacking. The fact that services are extraordinary is not enough to require the inference to compensate.

J. R. N.

* * * * * * * * * * *

CORPORATIONS - DISTRIBUTION OF STOCK DIVIDEND TO BENEFICIARY OR TRUST FUND.

Although not exactly in point, the case of Baumann v. Stetten, (257 N.Y. 480) suggests the apportionment of dividends between a life tenant and a remainderman of a trust. In the case mentioned the plaintiff turned over to two trustees four hundred shares of stock of Baumann & Co., which were owned by him. This was done pursuant to a separation agreement with his wife. She owned the remaining one hundred shares of stock in the company. By the terms of the agreement, the stock was delivered "solely for the purpose of guaranteeing the faithful performance of the terms of this agreement". Until default "all dividends or other income" should continue to be paid to him. The capital stock was increased from five hundred shares to three thousand five hundred shares by the declaration of a stock dividend. Now the plaintiff claims to be entitled to this dividend free from the claims of the defendant trustees. The court held, "such difidends as are physically manifested by the certificates of new stock are not such 'dividends or other income' as the parties intended should be tangibly held by plaintiff rather than the pledgees". (p. 485.)

The Court denied that there was an actual trust existing, even though the holders were termed trustees. They were in effect pledgees of the trust. By § 17-a of the Personal Property Law it is provided that, unless otherwise provided in the instrument creating the trust, all stock dividends shall be principle and not income. If the agreement in question were construed as a trust it would seem that the section quoted would be applicable to divert the stock to the plaintiff under exceptions giving effect to the settlor's intent.

The Personal Property Law abov does not, however, provide for the distribution between a life tenant and remainderman of ordinary and extraordinary cash dividends. The New York rule, following that of Pennsylvania, was stated by Judge Chase in Matter of Osborne (209 N.Y. 450, 477), "It should be held: 1. Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. 2. Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capita

of the trust fund as received from the testator or maker of the trust, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such way as to preserve the integrity of the trust fund". This rule shows that ordinary cash dividends will be given to the life beneficiary and the extraordinary cash ones will also be given to the beneficiary, if the payment does not entrench on the capital. This rule as to ordinary cash dividends is a rule of convenience, since it is quite possible that an ordinary dividend would be payable from the surplus accrued before settling the trust. The distribution of stock dividends is now declared by statute to be all in favor of the corpus of the trust, unless otherwise provided by the settlor, and to that extent abridges the rule as to ordinary stock dividends stated in Matter of Osborne (supra).

The Pennsylvania rule is that all dividends earned by the corporation before the creation of the trust go to the remainderman and dividends earned after the creation of the trust go as income to the beneficiary. (Earp's Appeal, 28 Pa. 368.) Although New York has adhered to this rule, especially in the case of the extraordinary dividends, as stated in Matter of Osborne (supra), there are two other rules which have attained equal prominence: the English rule and the Massachusetts rule. In the former it is held that ordinary dividends whether in cash or in stock go to the beneficiary and all extraordinary dividends go to the remainderman. Branch v. Sproule, L.R. 12 App. Cas. 385). By later English rule as stated in Re Speir, (1924, 1 Chan. 359), the distribution is dependent upon the intention of the corporation to convert the accumulated earnings upon which the extraordinary dividend is based into capital, or on the other hand, distribute it as profits. The Massachusetts rule is that all cash dividends are treated as income, whether ordinary or extraordinary, and all stock dividends are treated as capital, the property of the remainderman.

The Supreme Court of Rhode Island in the case of Rhode Island Hospital Trust Co. v. Tucker, (155 Atl. 661), reached a conclusion in harmony with § 17-a, Personal Property Law of New York, although it did so by following the Massachusetts rule. The trustees in that case, applied to the Court for directions as to the application of a stock dividend issued from surplus accumulated after the creation of the trust. The Court applied the dividend to the corpus of the estate.

The dissimilarity between an ordinary trust to pay income to a beneficiary and the agreement in Baumann v. Stetten, (supra) is brough out when it is considered that the husband was both beneficiary and ultimate remainderman. The wife had no interest in either the income or principal as such. Her interest was in the separation agreement and her ability to enforce it, which was secured by the pledge. The trustees, so-called, had no duties to perform and were merely pledgees until a default occurred, at which time they were to sell the security. In that event, and in that event only, would the wife have a right as beneficiary, because then the proceeds of the sale would represent and replace the defaulted payments.

The decision of the Court that the stock dividend was not part of the income to which the plaintiff was immediately entitled seems to have been well within the contemplation of the parties. Otherwise, the plaintiff by a default could forfeit the original four hundred shares and by the prior increase of capitalization still be the owner of twenty-four hundred shares which would not be forfeitable under the separation agreement. Under the construction placed on the agreement by the Court, prompt payments under the separation agreement were assured and the plaintiff's attempt to circumvent the agreement was forestalled.

J. E. W.

* * * * * * *

STATUTE OF FRAUDS - ORAL PROMISE TO INDEMNIFY A SURETY.

An interesting exception to the Statute of Frauds is presented in the case of an oral promise by one not a party to a note to indemnify a surety if the latter is held liable on his endorsement. In such a case, despite the apparent ban of the Statute of Frauds rendering a "promise to answer for the debt, default, or miscarriage of another person" unenforceable unless in writing (Personal Property Law, sec. 32), the promise is binding. When defendant orally promises the plaintiff that, if the plaintiff will become a surety on a note of a third party payable to a fourth party, the defendant will reimburse the plaintiff for any loss sustained, such promise is enforceable. (Gilinsky v. Klionsky, 140 Misc. 724).

Ordinarily, a promise to the creditor to become liable for the debt of another is unenforceable unless evidenced by a writing. That is, the promise is valid unless the defendant chooses to plead the Statute. (Crane v. Powell, 139 N.Y. 379). This is a rule of evidence designed to prevent exaggeration and distortion of apparently simple words into an obligation to pay the debt of another. The instant case, however, presents an exception to that rule.

If the promise is made to a surety, it is binding even though oral. The plaintiff, the surety, after the principal's default, is held liable on his endorsement. He is, therefore, a debtor of the original creditor, and this is substantially a promise to the debtor to pay his debt to such creditor. Of course, the original debtor was the borrower whose note the plaintiff endorsed; but the plaintiff has substituted for the original debtor and then, the defendant having promised to indemnify him, the promise is one to the debtor and enforceable by him. (Hardt v. Recknagel, 62 App.Div. 106; Richardson v. Crandall, 48 N.Y. 348.

It may be said, also, that this is not "a special promise to answer for the debt, default, or miscarriage of another person". It is one step removed. The defendant does not promise to answer for the principal's default. The plaintiff has already done that. It was the plaintiff who had to answer for the default of another. The

defendant has only promised the plaintiff that in such case the latter will be reimbursed. The promise was not to make good the debtor's default. It was to indemnify the one who had to make it good. And so, the promise is construed as original and not within the Statute. The argument of a separate consideration is introduced here to aid in the proof that this is an original promise, because it is supported by an independent consideration. Had the defendant promised the creditor to pay the principal's debt, such promise would have been interdicted by the Statute. But, he promised one who in turn had promised to make good to the creditor and so, the agreement was enforceable.

The opinion in the instant case follows the majority rule in this country. There was, previously a divergence of opinion in England, which of course accounts for the conflict in this country. (Thomas v. Cook, 8 Barn. & Cr. 728; Green v. Cresswell, 10 Ad. & El. 453; Larburg, etc. Co. v. Martin, 1902, 1 K.B. 778.) Even in our own state there have been flatly contradictory decisions. (Chapin v. Merrill, 4 Wend. 657; Jones v. Bacon, 145 N.Y. 446; Kingsley v. Balcome, 4 Barb. 131; Baker v. Dillman, 2 Abb. Pr. 313). States agreeing with New York include Massachusetts (Taylor v. Savage, 12 Mass. 98) and New Hampshire (Holmes v. Knights, 10 N.H. 175). On the minority side we have Missouri (Bissig v. Britton, 59 Mo. 204), Ohio (Easter v. White, 12 Ohio St. 219) and Alabama (Posten v. Clem, 201 Ala. 529).

The situation presented by this case should be distinguished from a similar but not identical division of the subject, which deals with oral contracts by a co-surety to repay to his fellow-endorsers any amount the latter may have to pay. The holdings follow the same lines, and for substantially the same reasons. Of course, in this case, the primary liability arises from the obligations of law created by signing the instrument, which also is a strong link of evidence in proving the agreement. When one co-surety promises to pay the whole amount due, his co-sureties may enforce that promise even though oral. (Horn v. Bray, 51 Ind. 355).

One of the leading cases, which settled the previous conflict of opinion in England, stated the rule thus: "In my opinion there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered or is about to enter, into a contract of liability indemnified against that liability, independently of the question whether a third person makes default or not." (Harburg, etc. Co. v. Martin, supra, 785).

The cases are divided into three classes: those similar to the instant case; promises to indemnify a sheriff or public officer against the consequences of a levy if it prove unauthorized. (Marcy v. Crawford, 16 Conn. 549); and promises by a third party to indemnify a bondsman if loss occurs. In this latter connection it has been held that such promises are enforceable only as to criminal bail bonds and not as to civil bonds, on the theory that there is no obligation on the part of the criminal to reimburse the bondsman,

and so, there can be no "default", because there is no duty. Therefore, a promise to reimburse is not dependent on the default of another and is not within the statute, but is an independent contract (Crim v. Hartnoll, 4 Best and S. 414.) The rule is quite narrow in its application, and will no doubt be confined strictly to similar facts, because otherwise the inroads into the Statute might be prodigious.

In this state, then, despite conflicting decisions, and in the majority of American states, and probably in England, an oral contract to indemnify a surety is enforceable.

W. A. G.

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The Faculty has generously consented to augment the interest and value of THE LAW REVIEW by the contribution to its pages of occasional articles. We are fortunate to present the first of the series in this, the final issue of the year.

As retiring members of the Law Review Board, we are indebted to Mr. Rogers and Dean Alexander for their active interest in and helpful criticism of our efforts. We feel that in fostering THE LAW REVIEW they have performed a substantial service both for us and for Albany Law School.

- The Editorial Board

THE OLDEST LAW SCHOOLS

The law is not only a jealous mistress, but the way to her favor is long and difficult. There is not now and never has been a royal road to knowledge of the law. From time immemorial her votaries have undergone a rigorous and extended training to qualify themselves for the high privilege of sharing in her mysteries.

This applies with particular force to the English Common Law. It cannot be learned from a book or a Code, but only from constant association with its theory and practice. So we find that students of English law have always been trained by masters and in schools. Little is known of the earliest of these schools. They existed in the City of London in the twelfth and thirteenth centuries and were under clerical control. Various events, chiefly a decree of Henry III prohibiting schools of law in the City of London, and a Papal Bull forbidding the clergy to teach the Common Law, broke up these schools. The establishment of the Court of Common Pleas in Westminster Hall as a result of Magna Charta naturally led to a concentration of men of the law in that neighborhood and, at the beginning of the fourteenth century, a group of hostels or inns for the reception and education of law students grew up in the suburban village of Holborn, between the City and Westminster. At this period none of these inns were important, but they must have been in existence and gathering strength and resources.

Holborn was then a village in the open country, with a lane running down hill to the River. On one side was the palace of the Bishops of Chichester, one of whom had been a Chancellor of England, so the lane was called Chancellor's Lane, now corrupted into Chancery Lane. Near the village were the manor houses of the Earls of Lincoln and the Barons Gray de Wilton. At the foot of the lane on the river bank was the splendid home of the Knights Templars, with their noble church which still stands to command our admiration as a monument of their vanished greatness.

During the next hundred years or so great changes took place of which we know little. The Templars were forcibly ejected from their home and were succeeded by the Knights of St. John of Jerusalem. The Bishops, Earls and Barons gave up their houses. The lawyers' hostels were continually increasing in power, numbers and wealth. When the mists of history clear away we find four companies of lawyers, well organized and in full working order, settled in the neighborhood. Two occupied the property of the Templars and were the societies of the Inner Temple and the Middle Temple; a third held the property in Chancery Lane of the Bishops of Chichester and the Earls of Lincoln and was known as Lincoln's Inn; the fourth was known as Gray's Inn because it occupied the former demesne of the Barons Gray de Wilton further to the north.

The earliest records of any of the societies are those of Lincoln's Inn, which begin in 1422. They show that the Society was then carrying on its activities under settled rules as to educational requirements and discipline.

Sir John Fortescue (1394 - 1484?) was a lawyer who had a remarkable career. After a notable success at the Bar he was made Chief Justice by Henry VI. The perquisites of his office were a salary of £150 per year; 106 shillings, 11 pence farthing for a fur trimmed robe at Christmas; 66 shillings, six pence for another robe at Whitsuntide; and two tuns of wine per year for life. On the losing side in the Wars of the Roses, he fled to France with the Queen and Edward, Prince of Wales, when Henry VI was captured and put in the Tower. While in France (circa 1468) he wrote his famous book, De Laudibus Legum Angliae, for the instruction of the Prince in the laws of the country over which he was expected to reign, but never did. It is in the form of a dialogue between the Prince and the Chancellor and gives us a vivid description of the Inns of Court of his day.

The Prince asks why the Laws of England are not taught in the Universities. The Chancellor replies that instruction in the Universities is in Latin. The study of the law requires the use of three languages, Latin, Law French and English, and so the best place to learn is in the Courts at Westminster Hall.

> "Here in Term Time the students of the law attend in great numbers, as it were to public schools, and are instructed in all sorts of law learning and in the practice of the Courts. The situation of the place where they reside and study is between Westminster and the City of London *** not in the heart of the City itself, where the great confluence and multitude of the inhabitants might disturb them in their studies, but in a private place, separate and distinct by itself, in the suburbs, near the Courts of Justice, that the students, at their leisure, may daily and duly attend with the greatest ease and convenience."

The method and form of the study of the law was that students first entered one of the Inns of Chancery, of which there were then ten, each with more than one hundred students. There they studied the nature of Original and Judicial Writs, "which are the very first principles of the law". After some progress and more advanced years, a student would be admitted to one of the four Inns of Court, only the more proficient being selected for this honor. They were large institutions, the smallest having over two hundred students.

Membership in one of these Societies was an expensive privilege. Besides the costs of admission, Fortescue says that a student could not maintain himself for less than £28, (the present equivalent of about $2,200) a year and, if he had a servant, "as for the most part they have", even more. "For this reason the

students are sons to persons of quality, those of inferior rank not being able to bear the expenses of maintaining and educating their children in this way. As to the merchants, they seldom care to lessen their stock in trade by being at such large yearly expenses. So that there is scarce to be found, throughout the Kingdom, an eminent lawyer who is not a gentleman by birth and fortune."

The Inns of Court in those days were more than law schools. They were schools of manners. Fortescue says they constituted

> "a sort of an academy or gymnasium fit for persons of their station; where they learn singing and all kinds of music, dancing and such other accomplishments and diversions (which are called Revels) as are suitable to their quality and such as are usually practiced at Court. At other times, out of Term, the greater part apply themselves to the study of the law. Upon festival days, and after the offices of the Church are over, they employ themselves in the study of sacred and profane history. Here everything which is good and virtuous is to be learned: all vice is discouraged and abandoned. So that the knights, barons and the greatest nobility of the Kingdom often place their children in these Inns of Court, not so much to make the laws their study, much less to live by the profession, but to form their manners and to preserve them from the contagion of vice. The discipline is so excellent that there is scarce ever known to be any picques or differences, any differings or disturbances among them. The only way they have of punishing delinquents is by expelling them from the society, which punishment they dread more than criminals do imprisonment and irons; for he who is expelled out of one society is never taken into any other. Whence it happens that there is constant harmony among them, the greatest friendship, and a general freedom of conversation. The manner and method how the laws are professed and studied in those places, is pleasant, and excellently well adapted for proficiency."

This sounds like a story of the Golden Age. Perhaps it was true. Such idyllic conditions unhappily did not continue. Records of later years are filled with orders of the Societies, the Judges, the Privy Council and the Crown, seeking to enforce discipline, study, respect, religious observances and even proper apparel, personal appearance and morals.

> "Civility and respect shall be paid by every fellow to his seniors. No fellow shall stand with his back to the fire. No fellow shall make any rude noise in the Hall during meal time. In cases of wilful contempts against Orders and opposition to execution of penalties, the punishments are: amerciament, skreening his name, coming in with congees, loss of chamber, prosecution by

Pension writ, prosecution by warrant from the Judges, suit on the bond, expulsion." (Ancient Standing Orders and Constitutions of Gray's Inn, 1629)

In 1635 the Benchers of Middle Temple promulgated general Orders which recited that they proposed to call to the Bar only those students who had attended for the full time and were otherwise qualified:

"and therefore they enjoin the gentlemen under the Bar to apply and follow their studies; to keep the Case; to perform their exercises; to order their habits and hair to decency and formality; and to yield due respect and observance to the Benchers and Antients, their governors, as they expect and desire the preferment of the degree of the Bar, or otherwise care to be lyable to the censure of the Bench or to be cut off from the Society."

Attendance at divine service and the taking of communion was obligatory. (Orders of Inner Temple, 1556, 1600; Middle Temple, 1635; Gray's Inn, 1629)

"That no fellow of this House should wear his beard above three weeks growth upon pain of twenty shillings forfeiture." (Orders of Inner Temple, 1553. See also Orders of Lincoln's Inn, 1542). The fashion having changed, these orders were annulled. (Orders of Lincoln's Inn, 1559).

"In 4 and 5 Ph. & M. (1557) it was ordered that none of this Society should henceforth wear any great Bryches in their Hoses, made after the Dutch, Spanish or Almon fashion; or Lawnde upon their Capps; or cut doublets*** and in 26 Eliz. (1584) there was this establishment here made for the Reformation in Apparel: 1. That no great Ruff should be worn. 2. Nor any white colour in Doublets or Hosen. 3. Nor any facing of Velvet in Gownes, but by such as were of the Bench. 4. That no gentlemen should walk on the streetes in their Cloaks, but in Gownes. 5. That no Hat or long or curled hayr be worn. 6. Nor any Gownes, but such as were of a sad colour." (Orders of Middle Temple, quoted in Dugdale, Origines Juridiciales, Ch. 61. See also Inner Temple, 1547, 1594, 1600; Lincoln's Inn, 1532, 1588; Gray's Inn 1574, 1610)

"None of the Society should, within this house, exercise the play of shoffe grote, or slyp-grote (is this the ancestor of pitching pennies?) upon pain of six shillings and eight pence." (Inner Temple, 1522)

"That there be no drinking of Healths; nor any Wine or Tobacco uttered or sold within the House. That there should not be any knocking with boxes, or calling aloud for Gamesters. That no Play be continued within the House upon any Saturday night, or upon Christmas Eve at

night, after xii of the Clock." (Inner Temple, 1632. See Gray's Inn, 1631, forbidding all playing with cards, dice, or otherwise, at all times of year except for twenty days at Christmas.)

"In 23 Eliz. (1581) there was an order made that no Laundress nor women called Victualers should thenceforth come into the Gentlemen's chambers of this Society unless they were full forty years of age; nor send their maid-servants of what age soever, into the said gentlemen's chambers; upon penalty for the first offense of him that should admit of any such, to be put out of commons; and for the second to be expelled the House." (Gray's Inn, quoted by Dugdale, op. cit. Ch. 67).

These various regulations indicate that students were human then as they are now; that there were some who were lazy, or refractory, or oddly individualistic and who had to be coerced into conformity with the prescribed regulations. Human nature changes very little, even through the centuries. They also indicate that the Inns of Court were more than merely technical schools. They were Universities in the broadest meaning of the word. The members were trained, not only as lawyers, but as scholars and gentlemen, worthy to take a place in that ancient and honorable company of the Bar of England.

THE TEMPLE

It is a fine morning in the year 1070. A worthy citizen of London starts to walk westward along the River to the neighboring village of Westminster. As he leaves the western City gate he has to cross a rushing little stream - the Fleet - running down to his left to empty into the Thames. On his right, up a gentle slope, he sees open fields with an occasional manor or country house of a bishop or noble. Also he sees a group of buildings which he knows to be the home of the Knights Templars. On his left, between the country lane on which he is walking and the River, is a pleasantly situated field, sloping to the south, with a frontage on the only practical highway of the times - the River. This he learns is the site of the new home of the Templars. So rapidly have they grown in wealth, numbers and power during their forty years in England that they have outgrown their old quarters and have just bought this new property. Workmen are engaged in laying up the walls of a curious looking round building. This is the new church of the Templars, which they are building before anything else because they are a religious order. Other buildings will follow.

A worthy citizen taking the same walk today will see none of those things. The city wall - and the Fleet River - have disappeared entirely. The country lane has become Fleet Street, whose roadway is filled from curb to curb with a confused mass of vehicles, mostly motor busses, and is bordered by a solid line of buildings on each side. In the center of the roadway

is a stone pillar topped by an improbable bronze animal. This is the "Griffin", which marks the site of Temple Bar, the ancient boundary of the City of London. Opposite the Griffin on the right is a huge pile of buildings - the Royal Courts of Justice. On the left is an archway. Across the front of it is a Latin inscription, the date 1684, and directly over the arch the Paschal Lamb with his cross and flag, the badge of the Middle Temple. This building is the Great Gate of Middle Temple and through the arch runs Middle Temple Lane, the principal entrance to the Temple. A little to the east is another and smaller gate and lane, leading to the Inner Temple.

Within these gates one is in a different world. The roar and bustle of London are gone. The place is quiet, peaceful, remote. Toward the River are the gardens - lovely stretches of lawn where the members play at tennis or have garden parties. It is one, and not the least, of the many charms of London that in the most unexpected places one finds these oases in the desert of brick and stone - gentle, secluded spots where one can rest and dream.

The present buildings in the Temple, except the Church, are all modern - using modern in the English sense as meaning anything since Queen Elizabeth's time. The Great Fire of 1666 destroyed most of the Inner Temple and practically off of its buildings are since that date. The Hall was actually built in the nineteenth century. Middle Temple was more fortunate, so far as the Great Fire was concerned, but in 1678 suffered the loss of five courts, containing most of the chambers of the Society. The buildings we see date from the late seventeenth and early eighteenth centuries. They do not look new.

The buildings are arranged in Courts, if anything so confused and confusing can be called arrangement. To go from one Court to another one passes under an archway, or by a dark passage through a building, or around a building and through an alley. A stranger will reach his destination, if at all, only after much wandering and many questions. A tour under the guidance of an expert is a revelation.

The names of the Courts hark back to olden times. Devereux Court and Essex Court recall the famous Earl of Essex. Pump Court, Vine Court, Elm Court and Fig Tree Court no longer display the objects for which they are named, although there is still a fountain in Fountain Court. The reason for the name of Brick Court is obvious. Paper Buildings have been so called for hundreds of years, but not because of their material. Kings Bench Walk is one of the few that really has a legal sound.

The dividing line between the buildings of the two Societies is delightfully vague. Generally speaking, the Inner Temple is the more easterly, but the only way to be sure is to look for the emblem. If a building has on its facade a lamb carrying a cross you are in Middle Temple; if it is a winged horse you are in Inner Temple.

Each Inn has its Hall, which is the center of the community life. Here the students "keep their Commons" by dining the required number of times during the Term. Here meetings of the Society are held. Here the successful student is called to the Bar. Here, in the old days, were held the exercises of the Society, the readings, moots and revels, which were performed by the members as matters of obligation.

The glory of the Temple is Middle Temple Hall. It was built in 1572 and stands today as it was built, having been spared the "restorations" which have ruined so many beautiful old buildings. It is 100 feet long, 42 feet wide and 47 feet high. Its roof, with hammer beams, is considered the best in London. The screen, separating the lower end of the Hall from the entrance way, is a fine piece of richly carved and decorated oak. The walls are panelled in small squares, each containing the coat of arms of a Reader. The windows are full of heraldry, showing the arms of famous members, including those of Edward VII who, as Prince of Wales, was called to the Bar and made a Bencher, honoris causa, in 1861.

Middle Temple Hall is a treasure house of historical association. If you are stirred by the great names of the law, you will find the arms of Plowden; Popham; Edward Montagu and Henry, his son, both Chief Justices of the King's Bench; Francis North, Lord Guilford; Edward Hyde, Lord Clarendon, the famous Chancellor of Charles II, whose daughter, Anne, was the first wife of James II and whose granddaughters, Anne and Mary, were Queens of England; John Scott, Lord Eldon, the Chancellor who always "doubted", and whose tenure of the Great Seal for twenty-five years was hardly long enough to permit him to deliver his judgments; Sir William Blackstone, the most famous legal writer of all time; the infamous Lord Jeffreys, who studied at Middle Temple but was called at Inner Temple, so the two Societies have to share the reproach; and hosts of others.

If you have an historical imagination, you may picture yourself seated at dinner in the Hall on August 4, 1586, when Sir Francis Drake, a member of the Society, newly returned from one of his expeditions "to singe the King of Spain's beard", came in to renew old acquaintanceships and received the joyful congratulations of the fellows; or you may be one of the company to welcome Queen Elizabeth on one of her several visits, probably accompanied by her favorite Robert Dudley, Earl of Leicester, or by Christopher Hatton, another favorite and later Chancellor.

Your tastes may be literary. In that case you will remember that "Twelfth Night" was first presented in Middle Temple Hall at the great Christmas revel of 1601, probably with Shakespeare himself in the company; that the white rose of York and the red rose of Lancaster were adopted as badges at a meeting in the Temple Gardens, (King Henry VI, Part I, Act 2, Scene 4); that Oliver Goldsmith lived at No. 2 Brick Court, where he wrote some of his most famous works, died there and lies buried in the old cemetery on the north side of Temple Church; that John Ford,

Wycherley and Congreve were members and Thomas Moore and Richard Brinsley Sheridan were students; that Dickens was thoroughly familiar with the Temple and laid many of his charming scenes in its precincts.

The Inner Temple is equally honored in its members. Among great lawyers we find Lyttleton and Sir Edward Coke, his more famous commentator; John Selden, the legal antiquary; Sir Thomas Bromley, who presided over the Commission that tried Mary, Queen of Scots, and who gave the opinion in Shelley's Case; Sir Heneage Finch, Earl of Nottingham, the greatest of a great legal family; Lord Thurlow, Chancellor for fourteen years, buried in Temple Church; Edward Law, Lord Ellenborough; John Singleton Copley, Lord Lyndhurst; and many more whose names are writ large on the scroll of England's law.

Inner Temple is rich in literary associations. Charles Lamb was born in Innter Temple Lane. Thackeray was a member. According to tradition, Chaucer and Gower were students. Samuel Johnson lived at No. 1, Inner Temple Lane, and the present building on the site is named for him. Boswell, appropriately, had chambers opposite.

The Temple is a place hallowed by the memories of bygone years. But it is not merely a shrine of memories. It was and is a powerful force, not only in the law but in every phase of English life.

Lincoln's Inn and Gray's Inn are of almost equal interest. Each has its Hall, its various courts and its garden. Each boasts of members famous in history and letters, as well as in law. Lincoln's Inn is peculiarly the Chancery inn and the great majority of Chancellors have come from its membership. For example, of the fourteen Chancellors during the reign of Queen Victoria, ten were of Lincoln's Inn. The most famous Lincolnians were Sir Matthew Hale and Sir Thomas More. The outstanding member of Gray's Inn was Sir Francis Bacon. Only the exigencies of time and space forbid further comment on these Societies.

ADMISSION

In early days a man who intended to follow the law as a profession would almost certainly enter an Inn of Chancery, as a preparatory school, and proceed from there to one of the Inns of Court. There were nine or ten of these lesser inns, Clifford's Inn, Clement's Inn and Lyon's Inn being attached to the Inner Temple; New Inn and Strand Inn to the Middle Temple; Furnival's Inn and Thavie's Inn to Lincoln's Inn; and Staple Inn and Barnard's Inn to Gray's Inn. The governing Inn of Court regulated the instruction in its dependents, supplied Readers, and Utter Barristers to conduct moots, and accepted the most promising of the students as members.

The practice of proceeding from an Inn of Chancery to an Inn of Court gradually waned, in spite of efforts to foster it by

preferences and rebates of fees to such entrants, until in the early eighteenth century the number of admissions from the Inns of Chancery was negligible and the lesser Inns gradually disappeared.

The only persons who were expressly excluded from admission to an Inn of Court were attorneys and solicitors. The reason was frankly stated:

> "For that there ought alwaies to be preserved a difference between a Counsellor at Law, which is the principal person next unto Serjeants and Judges in the administration of Justice, and attorneys and solicitors, which are but ministerial persons and of an inferior nature." (Orders for all Inns, 1614)

The present regulations for admission contain the same prohibition, although the "inferior nature" is not emphasized, and the list of persons excluded has been considerable extended, including solicitors' and justices' clerks and persons engaged in trade.

As a practical matter few persons, except those who possessed, or had the backing of, considerable wealth and high social position, were accepted. The fines on admission were high, the necessary expenses of membership were considerable and the Inns admitted that they were, at least in part, schools of manners and social graces in which only the nobility or gentry had a place. This exclusiveness made membership, or even lodging, in one of the societies all the more attractive and they were hard put to it to keep out undesirables.

> "For that the institution of these Societies was ordained chiefly for the profession of the law; and in a second degree for the education of the sons and youths of riper years of the nobility and gentry of this Realm; and in no sort for the lodging or abode of gentlemen of the country, which, if it shall be suffered, were to disparage the said Societies," it was ordered that no person lodge therein except those allowed as Utter Barristers. (Orders for Four Inns, 1614)

> "For that there may be great abuse in the lodging and harboring of ill subjects or dangerous persons in the said Inns of Court and Chancery, being privileged and exempted places," ordered, that there be general searches of the premises twice in every Michaelmas Term. (ibid)

Although social distinctions are no longer emphasized, admission to one of the Inns of Court is still difficult and expensive. The applicant must pay about $250 in fees and deposit $750 in addition, as security for the payment of subsequent charges. He must also produce certificates of character and fitness.

The educational pre-requisites for admission are not serious. In the early days there were none at all. Now an applicant must have passed one of a long list of prescribed examinations, of which the minimum is equivalent to college entrance requirements.

STUDY

The "case system" of studying law is supposed to be a modern invention. In fact it is the most ancient of all systems. The early records of the Inns of Court are filled with detailed regulations as to the work of the students, its quantity, quality and method, and modern educators may well admire its thorough and practical character.

On commencing his law study, the first duty of the student was to attend the courts in term time and make notes of the cases tried. Special places in court were assigned to students and judges would frequently elucidate some obscure point for their benefit. Books were few and expensive, so that these notes, with extracts from such reading as he could do, constituted the student's law library. After dinner and supper the students in each house would gather in groups of three. One put a doubtful question of law to the other two and they argued it. Then the proponent would give his opinion, also showing them the note of some case he had heard on the question. Occasionally there were "Chapel Moots", in which the students argued cases in Law French before the Utter Barristers.

During vacation, i. e. between the terms of court, the Inns conducted quite an elaborate course of instruction, consisting of moots and readings.

Moots were held nearly every evening. They consisted of a trial of a question of law. The pleadings were recited in Law French by the students, the arguments were made by Utter Barristers, also in French, and the decision given by three Benchers in English. Attendance at and participation in these moots were obligatory.

Readings were held twice a year, one by a First Reader during the Summer Vacation and one by a Double Reader during the Lent Vacation. A reading was a series of lectures on some statute. Famous readings were those of Sir Thomas Littleton on the Statute of Entails, Sir Edward Coke on Fines, and Sir Francis Bacon on Uses. The most famous of all was that of Serjeant Callis on the unsavory subject of Sewers, for many years a leading authority.

The Reader advanced his opinions as to the construction, operation and effect of the Statute; his opinions were attacked in argument by Utter Barristers chosen for the purpose and finally the Reader "doth confute all their sayings and confirmeth his opinion." Attendance at readings was also obligatory.

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This gives but a faint idea of the solemnity and grandeur which was attached to the readings. During his term the Reader was entitled to precedence over all other members of the Society. The readings began on the first Monday in Lent and the first Monday in August. On the Sunday preceding, the Reader attended church in state. After breakfast on Monday the statute was stated and various cases proposed, of which one was argued and decided. Then followed a great feast at dinner, after which further argument was had. This continued on Monday, Wednesday and Friday for a month (later two weeks). It was an exceedingly expensive undertaking for the Reader, as he had to bear the expenses of the feasts, to which he invited his friends and as many of the royalty and nobility as he could induce to come. It cost the equivalent of many thousands of dollars.

Participation in these exercises was of the utmost benefit to the student. Francis North, Lord Keeper Guilford, who was admitted to Middle Temple in 1665, was a great lawyer, whatever one may think of his political career. His brother gives this as His Lordship's opinion:

> "He used to say that no man could be a good lawyer who was not a put-case. Reading goes off with some cloud, but discourse makes all notions limpid and just; for in speaking a man is his own auditor to correct himself. Besides there are diversities of opinions and contentions in reasoning which excite thoughts that otherwise would never have arisen... And mistakes, almost incredible to the mistaker, being observed, cause a recurrence to the authorities, where an inspection convinceth and withal corrects the faulty assurance some will have in a mere memory." (Lives of the Norths, Vol. 1, p. 13)

Like most things that are both difficult and expensive, the readings gradually deteriorated. The selection of Readers came to be based on their ability to pay for the feasts rather than on their attainments, until it became necessary to make orders that they be chosen for "learning, duly keeping exercises of the House, honest behavior and good disposition and such as for their experience and practice be best able to serve the Commonwealth." The readings were much curtailed, to save expense, "which, if it should be permitted, would be almost an utter overthrow to the learning and study of the Law and consequently an intolerable mischief to the Commonwealth of this Realm," so that it was ordered that the readings continue three weeks at least and that the cost of the feasts be limited. (Orders of the Judges, 1591).

The readings also lost their quality and authority. Coke, commenting on the fact that Littleton cites as an authority a reading on the Statute of Westminster 2, says that the early readings were wholly excellent,

> "But now readings, having lost the said former qualities, have lost also their former authorities;

> for now the cases are long, obscure and intricate, full of new conceits, liker rather to riddles than lectures, which, when they are opened, they vanish away like smoke; and the readers are like to lapwings, who seeme to be neerest their nests when they are farthest from them, and all their studie is to find nice evasions out of the Statute." (Co. Litt. 280-a, note.)

Efforts to secure the attendance of students and barristers at the moots and readings were unremitting. The records are full of orders, imposing quite severe penalties for neglect. Since the readings and moots were held after dinner, attendance at Commons was the best way to insure attendance at the instructional exercises and the orders are usually so framed, e. g. "For that it is found by experience that by neglect of Commons in the Vacation the gentlemen of the Inns of Law are often drawn to frequent ordinaries, gaming houses and other places of disorder, whereby the neglect of their studies, if not the corruption of their manners, is occasioned," ordered that Commons be well kept. (Orders of the Judges, 1676).

This is the origin and reason for the requirement which continues to this day that every applicant for admission to the Bar must have attended a specified number of dinners in the Hall of his Inn.

Moots and readings have long since disappeared from the English system of legal education. The Council of Legal Education, a joint committee of the four Inns of Court, makes provision for examinations, which every candidate must pass before he can be called to the Bar. The Council also provides lectures on the required subjects, which candidates may attend if they choose, but the extent and method of legal study is wholly optional. The only absolute pre-requisite to admission is the "keeping of dining terms". It is curious that this old and now abandoned English idea of oral, technical and practical training has been revived in the United States and is considered of the highest value and importance. Our law schools urge their students to attend actual trials, and require or foster participation in moot court work.

CALL TO THE BAR

Whatever defects there may have been in their system, the Inns of Court were not chargeable with hasty prepartion or "cramming". A student, on entrance, became a member of the "Inner Bar" and was required to continue his studies for about seven years before he could receive promotion to the degree of "Utter Barrister". This was a "preferment or degree given him for his learning" and constituted him a member of the Bar.

The call to the Bar was by no means a matter of course. The Judges (1614) viewed with alarm the rapid increase in numbers of the profession and ordered that not more than eight per year should be called in any one Society, "for that the over great

multitude in any vocation or profession doth but bring the same into contempt, and that an excessive number of lawyers may have a further inconvenience, in respect of multiplying needless suits". The democratic idea of equal rights for all and no aristocratic privileges did not obtain in those simple days.

Even after his call, the Barrister was not permitted to practice in the courts. All of the Inns had orders prescribing a further period of from three to five years, to be spent in study and mooting, "for that the over early and hasty practice of Utter Barristers doth make them less grounded and sufficient, whereby the Law may be disgraced and the client prejudiced".

This extended probation met with the approval of the profession. Lord Guilford said:

> "That it is prudent not over soon to launch into practice; for it is observed that no person increaseth his store of law after he is called to the Bar and enters upon practice. His judgment and knowledge of forms may increase, but his book learning is at a stay, because business, either found or pursued, fills his head; so that even reading doth him little good. Whereof it is said that he who is not a good lawyer before he comes to the Bar will never be a good one after it." (Lives of the Norths, Vol. I, p. 50)

Those spacious and leisurely days are past. In England now, a man may be called to the Bar in a shorter time than in New York State. He may join an Inn when he is qualified to enter a University, may complete his dining terms in three years, meanwhile pursuing his legal studies at a University or elsewhere as he pleases, and, if he passes the Bar Examinations, may be called at the end of three years. The Inns of Court, formal and traditional as they are, have yielded to the pressure of modern times and are willing to let the Law and the clients take their chances with lawyers more rapidly educated.

REVELS

The social education of aspirants to the Bar had its finest expression in the exercises called Revels. In spite of the name, these were solemn and important occasions. Participation in them was obligatory and refusal to sing or dance entailed a fine. Once (in 1610) the inner bar of Lincoln's Inn were decimated out of Commons because they refused to dance before the Judges "according to the ancient order of the Society".

The grand days were Allhalloween, Candlemas, Ascension Day and especially Christmas. Then noble guests would be invited - royalty frequently graced the occasion - a great feast was provided, with music, singing, dancing and a play. Readers' feasts afforded another excuse for a revel. Then judges were the guests of honor. Each was presented with a wafer and a cup of hypocras

and witnessed a solemn revel, often with sacred music, and later a "post revel" of lighter character.

Sometimes the revels were a little boisterous. On one St. Stephen's Day the Inner Temple put on a hunting scene, in which a fox and a cat were liberated in the Hall and pursued to the death by twenty hounds. This was followed by supper, dancing and singing, all under the leadership of the Lord of Misrule. There could have been nothing solemn about that occasion.

The four Inns might join in a grand performance with a political significance. Such was the masque "Triumph of Peace", presented in 1633 as an expression of "love and duty" to Charles I and his Queen, which cost more than $100,000. Masques were given by the Societies on occasions of social importance, such as the marriage of Princess Elizabeth, daughter of James I, to Frederick V, Elector Palatine, and the marriage of the Earl of Somerset to Lady Essex in 1613.

The revels were not considered to be merely a form of entertainment and amusement. They were seriously, and properly, deemed to constitute an important part of a lawyer's education. They improved his presence, his literary taste and his rhetorical powers. They fitted him for participation in the affairs of the royal court, to which every lawyer aspired as the means of political and legal preferment. Not infrequently some unknown young man would attract the attention of those in high places by his skill and grace in these festivals and his fortune was made. The most noted example is Christopher Hatton. In 1562 he had a prominent part in the Christmas Revel at the Middle Temple. Lord Robert Dudley, afterwards Earl of Leicester and the Queen's darling, was "Prince of Sophie". Hatton caught the eye and vagrant fancy of the enigmatic Elizabeth and, in spite of meagre attainments as a lawyer, became Lord Chancellor. He is said to have "revelled his way to the Woolsack".

The advent of Oliver Cromwell and the Commonwealth put a stop to such frivolities, which were anathema to the sober minded Roundheads, and they were never revived in all their ancient glory and enthusiasm, even in the gay days of the Restoration. Perhaps we should not regret them, but it is hard not to wish that we might have seen just one of them.

* * * * * * * *

When one visits the Inns of Court it is not so difficult to imagine Sir Francis Bacon superintending the construction of the garden in Gray's Inn, or to see the ghosts of some of the famous people who have played their parts in Middle Temple Hall. There is a feeling of antiquity - an atmosphere of the past - that makes the olden times seem almost real.

To us in America the days of moots and readings and revels are dim and shadowy. We consider our own methods and achievements

so much superior that we accord our forerunners no more attention than a smile, half pitty and half derision. Such self-satisfaction is not wholly justified. Granted that modern law schools are excellent institutions and that their methods are proven by their results, it does not follow that we have nothing to learn from the past. Surely there can be no better training for the young lawyer than to study critically the actual trial of causes and then to practice the art of advocacy under the supervision and instruction of his elders and betters. This was the essence of the old system. It produced those great men who formed, nurtured and developed English Common Law and Equity and whose names will be honored as long as the science of the Law endures.

Ralph E. Rogers.

THE PRESENT TREND IN BILLBOARD REGULATION

That large, and it is to be hoped ever increasing, number of people who revolt so strongly against modern billboard advertising can look with satisfaction to one more case which is at least indicative of the increasing sympathetic attitude of the courts. The adjudication comes from no less a tribunal than the United States Supreme Court in the case of Packer Corporation v. State of Utah, (U.S. 1932, 76 L. Ed. 351). In brief, a statute of Utah made it a misdemeanor for any one to display on a billboard an advertisement of tobacco in any form. Other provisions of the law are not here involved. The appellant corporation was convicted under the law for displaying a poster advertising Chesterfield cigarettes on a billboard owned by it and located in Salt Lake City. Relying mainly on the equal protection clause of the Fourteenth Amendment of the Federal Constitution, the advertising company appealed to the Supreme Court. A unanimous bench, Brandeis, J. writing the opinion, found the law valid and the defendant guilty.

It must immediately be noted that the State of Utah was aiming, not at billboards, but at tobacco. The State has a long established and undoubted right to legislate in reference to the latter under the police power, (Austin v. Tenn., 197 U.S. 343). But even admitting this, the defendant urged that the law was arbitrary and unjustified in outlawing the use of billboards while still allowing other forms of tobacco advertising. It was just here that the court so quickly criticized the billboard and almost went out of its way to remark: "Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have those of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard." (pp. 353-354). This is welcome language. The billboard is not popular with the court. The case holds promise of similar opinions in the future in situations less strong against the defendant. Public reaction to the opinion is well mirrored by the editorial comment given it by the New York Herald Tribune of February 26th, 1932. It was there said, "Might it not serve, *** as a first tentative recognition that the individual may have some rights in the privacy which is so irresistibly invaded by the shreiking legends of the outdoor advertiser."

From the very first billboards have been the subject of strict regulation on the theory that unregulated they are a menace to the public health, safety, and morals of the community. Arguments, that they are dangerous fire hazards, that they shelter criminals and criminal acts, that they serve as an effective screen to unlawful dumping, and that they are dangerous to the

passerby when attacked by high winds, have all been advanced, and with considerable success, to place them under control, (St. Louis Gunning Advertisement Co. v. City of St. Louis, 235 Mo. 99; City of Rochester v. West, 164 N.Y. 510; Cusack Co. v. City of Chicago, 242 U.S. 526). In Kansas City Gunning Advertisement Co. v. Kansas City, (240 Mo. 659), a charge that billboards reflected the sun's rays was held sufficient to condemn them. In short, the courts have constantly sought to find some evidence of tangible harm on which to base a finding against this form of advertising. The lengths to which they have gone justify the oft repeated suspicion that the judges, as well as the public, are moved by aesthetic considerations. Henry P. Chandler in an article entitled, "Attitude of the Law Toward Beauty" says, "They (the courts) may profess to put their decisions on other grounds, but in their hearts this is the directing motive * * * with * * * the fantastic argument that billboards are a menace to public safety, the courts have given aid to the movement for protection against this disfigurement. * * * Has the time not come * * * when the court will * * * frankly approve reasonable regulation of the use of property in the interests of beauty?" (8 Am. Bar Assn. Journal 470). A similar article, "Public Esthetics and the Billboard", by Henry W. Proffitt deserves mention as well. He asserts, "In actual fact, the great majority of these advertising structures cannot be said to endanger * * * the public. * * * The complaint against the billboard * * * is simply - 'we don't like them'." (16 Cornell L. Quart. 151).

The principal contention of those who wish to see the billboard, if not entirely, to a large extent, outlawed is that the police power of the State should rightly extend to the protection of the aesthetic interests of the public. It is argued that such interests have a direct relation to the common welfare. No new principle of law is asked for. It is merely urged that an old one be extended to a logical and not unreasonable end. A liberal interpretation of what has been said of the police power seems to substantiate the claim. Consider, for example, this from Noble State Bank v. Haskell, (219 U.S. 104, 111), "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong or preponderant public opinion to be greatly and immediately necessary to the public welfare." The controversy of course is whether or not to satisfy the aesthetic desires of the public is a great public need. Some say, Yes, and some say, No. It is only fair to concede that the weight of opinion up to now is against taking legal cognizance of purely aesthetic considerations. Sight, of all the senses known to man, has been the least favored by the law. "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." (City of Passaic v. Paterson, etc. Co., 72 N.J.Law 285, 287). " * * * as far as we are advised, it has never been held that these considerations alone wil justify, as an exercise of the police power, a radical restriction of the right of an owner of property to use his property in an ordinary and beneficial way."

(Varney v. Williams, 155 Cal. 318). These quotations fairly represent the law's past attitude toward the subject. To change that attitude and to give the sense of sight and beauty some legal protection may be said to be the aim of those who advocate the abolition of the billboard, at least from those places which it tends to damage. A belief that that change is now beginning to take place is justified not only by the instant case but by others.

Outstanding among the latter is St. Louis Poster Advertising Co. v. St. Louis et al. (249 U.S. 269). Strict regulations of billboards were sought to be enforced by the City of St. Louis. The Supreme Court upheld the city in a characteristic opinion by Holmes, J. He said, "Possibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary." (p. 274). This is certainly a breaking away, however small, from the rigidity of the old rule. The words are instinct with the thought that in another case requirements not so trifling may receive a like condonation. The instant case is a fitting successor to this one and together they lay a very firm fourndation for future cases which it is to be hoped will attack the billboard even more directly.

In General Outdoor Advertising Co. v. Indianapolis, (Ind., 1930, 172 N.E. 309), the validity of a city ordinance prohibiting the location, erection, or maintainance of billboards within 500 feet of any park, parkway, or boulevard was in question. In upholding the law, the court made the following sensible observation: "* * * where a regulation of billboards does not apply to an entire city, but merely applies to billboards in close proximity to public parks and boulevards, it may properly have a relation to the public health, comfort, and welfare which it would not otherwise possess. * * * it is only reasonable that the surroundings of a park should be kept in harmony therewith, if practicable to do so." (pp. 312-313). This case has been widely heralded as one leading the way to a more sane view of a very real evil. Slight argument seems necessary to show that the reasoning here used would have a like application to a statute prohibiting billboards which deface the great expanses of open country now reached by nearly all by means of the modern highway and the cars that travel them. Surely government could have a far less worthy object than to protect the natural beauty, intangible as it is, with which the land is endowed. "* * * the views in and about a city, if beautiful and unobstructed constitute one of its chief attractions, and in that way add to the comfort and well-being of its people." (In re Wilshire, 103 Fed. 620, 623).

We in New York are peculiarly interested in the position taken in this State. The question seems not to have been litigated here at any length. In City of Rochester v. West, (supra)

it was held that the plaintiff was within its lawful rights in regulating billboards as to height in the interest of the safety of the passerby. People ex rel Wineburgh Advertising Co. v. Murphy, (195 N.Y. 128) is hardly in point. There the Advertising Company won a victory over a statute defining sky signs and providing that they should not be over 9 feet above the front wall or cornice of the building. It was held that the law arbitrarily prohibited an advertisement without prohibiting any other structure of an equal or greater height. This seems fair enough. Perhaps the best word on the subject has been spoken by Angell, J. in People v. Sterling, (128 Misc. 650, aff'd. 223 A.D. 846), where Section 61-a of the Conservation Law was upheld. The law provides in effect that in order to conserve the natural beauty of the Adirondack Park no person shall erect ormaintain within said park any advertising sign or billboard except under written permit from the Conservation Commission. The learned judge said, "We have reached a point in the development of the police power where an esthetic purpose needs but little assistance from a practical one in order to withstand an attack on constitutional grounds." Not to the knowledge of this reviewer has the Court of Appeals said as much. If and when they do, the campaign against billboard advertising in this State will be on the high road to success.

A consideration of what has transpired in England should give us added hope for our own future. A half century ago there was agitation there against those who threatened to do violence to what was termed the "amenities of the landscape." The agitation grew and in 1893 a "Society for Checking the abuses of Public Advertisers" was formed. This quickly became, by convenient abbreviation the "Scapa Society" and soon other Scapa Societies grew up, all with a common program. In 1907 the Societies saw their wishes become law in the Advertisements Regulation Act which empowers county councils to make laws for regulating, restricting, or preventing the exhibition of advertisements calculated to disfigure the natural beauty of the landscape. The law was upheld, amended in 1925, and has enjoyed an increasing popularity. (See United Bill Posting Co. v. Somerset County Council, 133 L.T. 117, 42 T.L.R. 537, 93 L.J.K.B. 899)

To go to another jurisdiction still more distant than England, namely the Philipine Islands, we find an expression of judicial opinion which is all that the most ardent enthusiast for aesthetic liberty could desire. By statute there, the Collector of Internal Revenue was authorized summarily to remove any sign or billboard exposed to public view, which, after investigation, he decided was "offensive to the sight or otherwise a nuisance." This was upheld in Churchill v. Rafferty, (32 Philipine Reports 580) against a claim that it was contrary to what there corresponds to our Fourteenth Amendment. It was said, "Without entering into the realm of psychology we think it quite demonstrable that sight is as valuable to a human being as any of his other senses, and that the proper ministration to this sense conduces as much to his contentment as the care bestowed upon the senses of hearing or smell, and probably as much as both together. Objects may be

offensive to the eye as well as to the nose or ear."

The peculiar wording of the quotation above taken from the Statute, namely, "offensive to the sight or otherwise a nuisance", implies that the law was founded on the theory of nuisance and not on the more general ground of the public health, morals, and safety. There is much substance to the contention that billboards are plain nuisances and nothing less. Credit is here given to Ralph Straub's splendid article, "Municipal Regulation of Billboards", (28 Law Notes 68), for an extended treatment of this argument. It is there pointed out that unlike an ugly house or an unsightly barn along the way of the traveler which at least are not built for the sole purpose of attracting attention, the unsightly signboard is located at those places where to see them is inevitable. To place them elsewhere would defeat the very purpose of their existence. To thrust them upon the attention of the public is the first interest of their creators. Mr. Straub, with evident indignation, asks the question: "Is the ocular and mental discomfit resulting to the traveler from a continued assault of billboards to be waved lightly aside as an aesthetic consideration? * * * Is it not an affront to the dignity of the human race to follow it about and hold a sign in front of its face wherever it goes?"

Perhaps it is too much to expect that in our materialistic United States the billboard, so strongly linked with big business, will be outlawed in the interests of mere beauty. On the other hand we can be assured that to aim high will certainly bring some measure of success. It is true that the billboard is no longer, if ever it was, a friend of the courts. This in itself is a guarantee that doubts will be resolved against this form of advertising. In any event, the billboard can last only as long as the public wants it, if government continues to function as it should. But here, as elsewhere, "eternal vigilance is the price of liberty".

- H. S. V. S.

NEW YORK AND THE FOREIGN DIVORCE PROBLEM

When will a foreign divorce decree be recognized and enforced in New York State? At the risk of seeming presumptious in attempting to answer this intricate legal question in view of the many authoritative treatises on the general problem of recognition of foreign divorce decrees the writer respectfully submits that further discussion will not be amiss because of the apparent indecisiveness in the minds of non-expert counsel as to just what the present law of this State is in this regard. The problem of the recognition of such decrees is certainly one that can be exceeded by no other legal problem in importance because it so intimately concerns the relationship of husband and wife, of parent and child, and that most carefully protected ward of the common law - property rights. Because of holdings in analagous situations the courts of the various states have created the anomaly of husbandless wives and wifeless husbands.

In the creation of our Federal form of government and with the adoption of our Federal Constitution the establishment of divorce courts and divorce laws was left under the absolute control of each state. A state being sovereign in this respect it has control over the marriage of its domiciled citizens and it follows, as a matter of law, that this control extends to divorce, which one author defines as "the termination of the legal relationship between husband and wife by an act of law." In "Haddock Revisited" (39 Harvard Law Review 417), Professor Joseph H. Beale observes:

> "A state cannot be deprived directly or indirectly of its sovereign power to regulate the status of its own subjects and citizens by the fact that subjects and citizens of other states, as related to them, are interested in that status."

The Roman Law treated the entrance into and the exit from the marriage relation as the sole business of the parties themselves, (3 Select Essays in Anglo-American Legal History 782). In our present civilization the marital relationship is more than a private affair of the parties to the marriage agreement to be entered and dissolved at will. Bishop in "Marriage, Divorce and Separation" (section 856) states:

> "Marriage is a civil status of one man and one woman legally united for life with the rights and duties which for the establishment of the family and the multiplication and the education of the species * * * may thereafter be assigned by the law to matrimony."

In Conflict of Laws, the usual statement in Anglo-American countries is that all questions of status are determined by the law of the domicile. (Goodrich, Conflict of Laws (1st) 230). There may be no doubt that the New York courts have always subscribed to this fundamental dogma, (11 Cornell Law Quarterly 145).

The state of domicile, therefore, is so peculiarly interested in the relation of marriage that it has jurisdiction over the status and may put an end to it. Since the domicile of the parties is the fulcrum around which status and jurisdiction revolve it is necessary to understand fully the legal meaning of the word domicile. The terms "residence" and "domicile" might well be taken to mean the same thing, a place of permanent abode. But "domicile" has acquired a technical meaning in the field of law. Justice Story defines it as follows:

> "That is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intent of returning." (Story, Conflict of Laws (7th), sec. 41).

To acquire a new domicile three elements must exist, (a) the act of removal from the existing domicile with no present intention of returning thereto, (b) actual residence in the new locality coupled with the present intention of residing there indefinitely, (c) the legal ability to acquire a new domicile. It is the law in this country that a husband takes his comicile with him wherever he goes with animus manendi and a wife's domicile follows that of her husband unless he abandons her without justification or she leaves him for good and sufficient reason; to wit: facts constituting a cause of action in her favor for separation or divorce. "Matrimonial domicile" is likewise very important in determining jurisdiction. From the language of certain decisions by the Supreme Court of the United States it seems that matrimonial domicile means nothing more than the place where the parties last lived together as husband and wife with the intent of making that place their home.

Divorce actions are often spoken of as causes having the nature of actions in rem, or as actions quasi in rem. For one state to have such jurisdiction as to entitle its decrees to recognition and enforcement by New York courts, that state must have jurisdiction of the res. The res in divorce actions is the marital status. As an action in rem or quasi in rem the cause must be brought where the res is situated. While it is true that New York must now regard divorce actions as having the nature of actions in rem, this has not always been so. For some time in the history of divorce law in New York itwas regarded as an action in personam. In the early cases of Borden v. Fitch, (15 Johns. 121) and Bradshaw v. Heath, (13 Wend. 407) we find the principle clearly enunciated that a court of another state could not dissolve the matrimonial relation of a citizen of New York, domiciled in New York, unless he was actually served with process within the other state or voluntarily appeared in the cause. This doctrine was reiterated by Judge Andrews in Jones v. Jones, (108 N.Y. 415, 424):

> "The contract of marriage cannot be annulled by judicial sanction any more than any other contract interpartes, without jurisdiction of the person of the defendant. The marriage relation is not a res within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize

> the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending."

In a sentence, then, the law of New York was that, if a foreign divorce was to be respected in New York, the proponent had to show that at least one of the parties was domiciled in the state that gave the decree and that there was personal jurisdiction over the other. This was followed consistently until the United States Supreme Court in the famous case of Atherton v. Atherton, (181 U.S. 155) overruled this theory and treated divorce actions as having the nature of actions in rem. The following language summarizes the present day doctrine:

> "A proceeding for divorce partakes of the nature of a proceeding in rem rather than of proceedings in personam; the res being the status. At the same time these causes cannot be said to be altogether proceedings in rem. There is a personal element that enters into them, not found in suits instituted merely to subject or affect property. It results therefore that these causes constitute in some measure a dividing line between proceedings strictly in rem and proceedings strictly in personam, partaking in part of the nature of each; the former, however, predominating. Hence they are very often very properly denominated proceedings in rem." (Minor on Conflict of Laws, 191; cited in Joyner v. Joyner, 131 Ga. 217, 223).

Since domicile is a jurisdictional fact, the courts of New York have the right to inquire into the facts presented to the courts of the sister state to determine for itself whether or not the court rendering the decree had jurisdiction. In other words, the courts of New York may determine whether fraud was practiced upon the foreign court.

The recent case of Larrick v. Walters (Ohio), (177 N.E. 642), illustrates clearly the power of a court to inquire into the jurisdictional facts. In this case the husband sought a divorce from his wife in Ohio. It was refused. He then went to the State of Washington, where he obtained a divorce and returned to his home immediately after the divorce was granted. When the Washington divorce was urged as a bar to an action for separation by the wife, the Ohio court refused to recognize the foreign decree holding that:

> "mere residence within a particular state in a divorce cause is not sufficient to confer jurisdiction upon a court of that state to dissolve the marriage relation existing between a plaintiff and non-resident defendant and to determine all rights between said parties."

This case merely states a well settled rule of the New York courts and United States Supreme Court that they may and will disregard decrees where the plaintiff was not, as he claimed to be and as

it was necessary that he should be in order to maintain his suit, a bona fide resident of the foreign state. (Bell v. Bell, 181 U.S. 175; Kerr v. Kerr, 41 N.Y. 272).

Furthermore, jurisdiction cannot be conferred by the consent of one party, or by the consent of both, as in the case where both parties go into another state to secure a divorce without establishing a domicile. (Lister v. Lister, 86 N.J.Eq. 30).

Keeping these general observations in mind, let us examine the cases to determine what New York will do in specific instances.

WHAT DECREES MUST NEW YORK RECOGNIZE?

A divorce decree rendered in a state where both parties are domiciled is entitled to recognition in New York and the other states of the United States, and such recognition will be compelled under the full faith and credit clause. (Hunt v. Hunt, 72 N.Y. 217; Kapigian v. Kapigian, 212 Mass. 412).

A divorce decree rendered by a court at the matrimonial domicile, in accordance with prescribed procedure, must be recognized by New York state and the other states under the full faith and credit clause, even as against a non-resident defendant who was not served within the state and who did not appear in the action. (Atherton v. Atherton, supra).

New York State must recognize and accord full faith and credit to decrees obtained by a domiciled citizen of another state against one not a resident thereof, provided there was personal service of process upon the latter within the foreign state, or appearance by him in the action. (Cheever v. Wilson, 9 Wall. 108; Jones v. Jones, 108 N.Y. 415).

WHAT DECREES DOES NEW YORK RECOGNIZE ALTHOUGH NOT COMPELLED TO?

Now then we come to the situation where one party is domiciled in the state of the forum and there is constructive service upon the defendant domiciled in another state. Divorces so obtained are termed ex parte divorces. It was held in the famed case of Haddock v. Haddock, (201 U.S. 562) that where there is domicile of the plaintiff but not domicile of matrimony and only constructive service upon the defendant domiciled in another state, the decree may be treated as valid by any other state, but no state is compelled to treat it so under the Federal Constitution. It is in the recognition of such ex parte divorces that the most confusion exists.

> "That the decree should be recognized was the majority view of state courts prior to the decision in the Haddock case, and has continued to be the prevailing doctrine since * * * The minority of states which refuse to recognize the foreign decree given under the same circumstances as that in the Haddock case continue to do so * * *!" (Goodrich, Conflict of Laws (1st) 250).

New York State is one of the minority mentioned in the above quotation. In other words, New York refuses to recognize ex parte divorces obtained under the exact circumstances of the Haddock case.

However, New York will recognize certain ex parte divorces if our public policy permits in conformity with the rules of comity. There appear to be at least four instances when New York will accord recognition.

First: Under the renvoi doctrine. This is illustrated by the recent case of Ball v. Cross, (231 N.Y. 329). The wife and husband had lived in Texas. The husband moved to Nevada alone and there upon constructive service of his wife, procured a divorce. The wife married a resident of New York who now sues for annulment on the ground that his wife's divorce from her first husband was void in New York. The New York court held that the law to determine the validity of the Nevada decree was the law of the state wherein the wife was domiciled at the time the decree was procured by the first husband. If that law respected the decree, New York would, too. In Dean v. Dean, (241 N.Y. 240, 245) Judge Cardozo writes,

> "* * * the divorce decree of Pennsylvania ought not to be recognized as valid in New York unless it would have been recognized as valid in the country in which the wife was domiciled at the time when the decree was made * * * If the country of her domicile was satisfied, we might follow where they led."

To summarize this first limitation to the Haddock case: New York will recognize the foreign decree as res adjudicata if the defendant was not domiciled in New York at the time of the foreign divorce proceeding and the state in which such spouse was domiciled did respect such a decree.

Second: Under the estoppel theory. Where the divorce is being attacked by the very person who obtained the decree the courts hold that he is estopped from questioning the validity of the foreign decree. (Starbuck v. Starbuck, 173 N.Y. 503).

Third: Under the same grounds theory. Although there seems to be no case directly in point, the inference to be drawn from dicta in several cases is that New York will recognize ex parte divorces where they are obtained on the grounds of adultery.

> "The ground upon which the divorce was sought was not recognized by the laws of this state as a ground for divorce." (Olmstead v. Olmstead, 190 N.Y. 458, 463)

See also Gould v. Gould, 235 N.Y. 14

Fourth: Gould v. Gould (supra) held that where a decree of a French court, granting a divorce to a husband domiciled in New York on the ground of the wife's adultery in that country, does not controvert the public policy of the State of New York, the offense being one for which the laws of New York would grant a divorce, and the courts of New York may properly recognize the foreign judgment in conformity to the principles of comity. While this is not an ex parte divorce cause, it seems to be another case where the public policy of New York State permits recognition of a foreign decree.

THE DOCTRINE OF LAST CLEAR CHANCE

The plaintiff's intestate was, and for several years had been, an engineer in the employ of the defendant. He was ordered to run an extra freight train from Pine Bluff to Texarkana, Arkansas. The train was operated under telegraphic orders. An order was received at McNeil station and was misinterpreted by the deceased and the conductor who was in charge of the train. As the train was pulling from the siding onto the main track, the swing and rear brakemen discovered the mistake. They yelled to the conductor and started to apply the air. The conductor refused to allow them to "pull the air" and asked for the orders. While he was rereading them, there was a headon collision in which deceased met his death. The plaintiff proved, by experts, that if the air had been "pulled", the accident would have been averted. In bringing the action, the plaintiff contended that the accident was the proximate result of the conductor's negligence in not allowing the train to be stopped after discovering the perilous position in which deceased was placed by his own negligence. The contention of the defendant was that the deceased was guilty of negligence which contributed to his death. The court, holding that the last clear chance doctrine was applicable, affirmed the judgment for the plaintiff. (St. Louis Southwestern Ry. Co. v. Simpson, 43 S.W. (2d) 251). In their decision, the doctrine of last clear chance was expressed as follows: " --- where one discovers the perilous position of another in time, by the exercise of ordinary care to prevent injury to him, it is his duty to do so, and he is guilty of negligence if he fails to do so, which is regarded in law as the proximate cause of the injury, and this, too, regardless of the contributory negligence of the injured person." (p. 253).

If, in the above case, the doctrine of contributory negligence had been held applicable, the plaintiff would not have been able to recover, as it was deceased's negligence which placed him in the perilous position. "Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of duty which the law imposes upon persons to protect themselves from injury, and which, concurring and co-operating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." (45 C.J. 942). As expressed in Bigelow on Torts (7th ed., p. 389), "Only such contributory act or omission as may be considered a proximate cause of the misfortune complained of can bar the action." The negligence complained of "must be a proximate cause of the injury" (45 C.J. 942) and not a cause which merely contributed remotely to the injury. From these authorities, it is seen that the negligence of the plaintiff, in order to have the doctrine of contributory negligence apply, must concur, as a proximate cause, with the negligence of the defendant in producing the loss.

The doctrine of last clear chance had its origin in the now famous case of Davies v. Mann (10 M. & W. 546) and is sometimes referred to as the discovered peril doctrine. The Davies case (supra) is frequently called the "donkey case". The plaintiff

fettered the forefeet of his donkey and turned it into the public highway to graze. The defendant, driving along the road at a fast clip, ran into and killed the donkey. The plaintiff brought an action to recover for the loss of the donkey. The defendant alleged that it was unlawful for the plaintiff to turn the donkey loose in the public highway and that, therefore, the plaintiff was guilty of contributory negligence which barred his action. In deciding this case in favor of the plaintiff, the court held that "the negligence which will preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequence of defendant's negligence." (p. 548). This case was decided in 1842 and the court stated therein that it was merely following the rule laid down in Bridge v. The Grand Junction Ry. Co., (3 M. & W. 244) where the rule was stated to be that "although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover - - -." The same rule was applied in the still earlier case of Butterfield v. Forrester, (11 East 60), decided in 1809. It is clear that the court, in deciding the Davies case (supra), did not intend to make any new rule of law but held only that the plaintiff's negligence was too remote to be considered a proximate cause of the accident.

The following general requisites must be found before the last clear chance doctrine applies: (1) the plaintiff must have been guilty of negligence which placed him in a position of peril, (2) the defendant must have had knowledge of plaintiff's perilous position, (3) the defendant must have acquired such knowledge in time to avoid injuring the plaintiff by the exercise of due care and diligence. As expressed in Wilson v. Illinois Central Ry. Co. (150 Iowa 33), "The doctrine of last clear chance presupposes negligence on the part of the party injured and proceeds upon the theory that notwithstanding this negligence, if the other party, being cognizant of that negligence and of the peril in which the party had placed himself, failed to take the necessary precautions to avoid injuring him, he is liable on the theory that he had a fair chance to avoid the catastrophe by the use of ordinary care and his failure to exercise it is in such cases the proximate cause of the injury."

In all jurisdictions, the necessity of proving negligence on the part of the plaintiff is recognized. The court refused to charge the discovered peril doctrine at the request of the defendant in Campion v. Eakle (79 Colo. 330) and held: "There being no contributory negligence on the part of the plaintiff, there is no place here for such an instruction." The doctrine does not apply unless negligence has been shown on the part of the plaintiff. (Rider v. Syracuse R.T. Ry. Co., 171 N.Y. 139; Southern Ry. Co. v. Wahl, 196 Ind. 581; 7 L.R.A. (N.S.) 132).

The burden of proof is on the plaintiff to show that his negligence was a remote, and not a proximate, cause of the injury. "If just before the climax only one party had the power to prevent

the catastrophe, and he neglected to use it, the legal responsibility is his alone. If, however, each had such power, and each neglected to use it, then their negligence was concurrent and neither can recover against the other." (Dyerson v. Union Pacific R. Co., 74 Kan. 528, 536). In Smith v. Norfolk & S.R. Co. (114 N.C. 728), the court stated: "If the negligence of the plaintiff - - - concurred with that of defendant up to the very instant of the accident, or if it continued at least as long as the defendant's negligence, the doctrine cannot be properly applied against the defendant." The plaintiff's negligence bars his action if it is a proximate, and not a remote, cause of the injury. (Robbins v. Penna. Co., 245 Fed. 435; Haley v. Earle, 30 N.Y. 208; Clemens v. Chicago etc. R. Co., 163 Iowa 499, 502; Jenkins v. Southern Ry. Co., 196 N.C. 466; Velthusen v. Union Ry. Co., 152 A.D. 121; 45 C.J. 987; 7 L.R.A. (N.S.) 132).

The perilous position of the plaintiff must be an actual one from which injury is not unlikely to result. It is insufficient if the peril is remote, uncertain, or contingent. It must be real, imminent, and immediately impending. (Siegel v. Wells (Mo.), 287 S.W. 775; 45 C.J. 992).

The question as to whether the defendant must have actual or implied knowledge of the plaintiff's peril is mooted. In discussing this point in the case of Emmons v. Southern Pac. Co. (97 Ore. 263, 285), the court stated: "In our judgment, the addition of what the defendant ought to have known is not sound as a matter of law. It introduces the question of comparative negligence. It does not deal between the parties with equality. It excuses the negligence of the plaintiff at a certain point, but does not excuse that of the defendant at the same point." This viewpoint is sustained in several jurisdictions. (Williams v. Mason City & Ft. D. Ry. Co., (Iowa), 214 N.W. 692; Wilson v. Illinois Central Ry. Co., 150 Iowa 692; Pennsylvania R. Co. v. Bell Concrete Const. Co., Inc. (Md.), 137 Atl. 503; Southern Ry. Co. v. Wahl, 196 Ind. 581; Graybill v. Clancy, (Okla.), 291 Pac. 87; 20 R.C.L. 142). In other jurisdictions, the rule is that if defendant knew, or should have known, by the exercise of reasonable care and diligence, that plaintiff was in a position of peril, he is liable for the injury. (Thompson v. Quincy O. & K.C.R. Co., (Mo.), 18 S.W. (2d) 401; McGuire v. Springfield Traction Co., (Mo.) 30 S.W. (2d) 794; Robbins v. Penna. Co., 245 Fed. 435; Virginia E. & P. Co. v. Jayne, (Va.), 144 S.E. 638). It should be noted, in reading the cases, that an exception is made as to railroads. Most courts hold that if the engineer ought to have seen the person in danger, knowledge will be imputed to him. (Starck v. Pacific Electric R. Co., 172 Cal. 277).

The knowledge, whether actual or implied, must have been acquired by the defendant in time to have avoided the accident by the exercise of due care and diligence. As succinctly stated in Ashley v. Virginia Ry. & Power Co., (138 Va. 310), "One relying on the doctrine of last clear chance has the burden of proving affirmatively by a preponderance of evidence that by the use of

ordinary care after his peril was discovered there was in fact a last clear chance to save him." The defendant may not be held liable if he failed to discover the peril of the plaintiff until too late to avoid injuring him. (McLeod v. Charleston Laundry Co., (W.Va.), 145 S.E. 756; Williams v. Mason & Ft. D. Ry. Co., (Iowa), 214 N.W. 692; Penna. R. Co. v. Bell Concrete Const. Co., Inc.,(Md.) 137 Atl. 503; Southern Ry. Co. v. Wahl, 196 Ind. 581; Thompson v. Collins, (Wash.), 247 Pac. 458; Graybill v. Clancy, (Okla.), 291 Pac. 87; Wright v. Union Ry. Co., 224 A.D. 55, aff'd. 250 N.Y. 526; Spooner v. D.L. & W. RR. Co., 115 N.Y. 22).

The question as to whether this doctrine is an exception to, or limitation on the doctrine of contributory negligence, is interesting from an academic viewpoint. In some jurisdictions, the doctrine is considered as "an exception to the rule that the contributory negligence of the plaintiff is a bar to his action." (St. Louis Southwestern Ry. Co. v. Simpson, (Ark.), 43 S.W. (2d) 251). "The view generally accepted, however, is that it does not supplant or destroy or constitute an exception to the general doctrine of contributory negligence, but is merely a qualification thereof - - - because such negligence does not in a legal sense contribute to the injury, being a remote, and not a proximate cause." (45 C.J. 989). In Bourrett v. Chicago etc. R. Co., (Iowa) (121 N.W. 380, 383), the court said, "The rule constitutes no exception to the general doctrine of contributory negligence, but merely operates to relieve the negligence of the plaintiff, which would otherwise be regarded as contributory from its character as such." This latter theory would seem to be correct, especially in view of the fact that the court did not consider that they were laying down any new rule when deciding the Davies v. Mann case (supra).

In New York State, the courts have been very cautious in applying the doctrine and do not attempt to draw fine distinctions between it and contributory negligence. "Unless the character of the accident is such that it can be fairly said that the negligence of the injured party is but a remote cause, the exception (discovered peril doctrine) is not applicable." (Rider v. Syracuse R.T. Ry. Co., 171 N.Y. 139). It has been uniformly held, in this jurisdiction, that the plaintiff's negligence must be remote and that the defendant must have discovered the plaintiff in a position of danger in time to avoid injury to him by the exercise of due care and diligence. (Haley v. Earle, 30 N.Y. 208; Spooner v. D.L. & W. RR. Co., 115 N.Y. 22; Wright v. Union Ry. Co., 224 A.D. 55, aff'd. 250 N.Y. 526; Bragg v. Central New England Ry. Co., 152 A.D. 444, rev. on other grounds, 228 N.Y. 54; Velthusen v. Union Ry. Co., 152 A.D. 121). The question as to whether the defendant must have actual or implied knowledge ~~next~~ has not been definitely adjudicated in this State. The Court of Appeals recently held: "The doctrine of last clear chance, however, is never awakened into action unless and until there is brought home to the defendant to be charged with liability a knowledge that another is in a state of present peril in which event there must be a reasonable effort to counteract the peril and avert its consequences.---

--Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance (cf. Bragg v. Central New England Ry. Co., 238 N.Y. 54) but knowledge there must be, - - -." (Wolozynowski v. N.Y.C. RR. Co., 254 N.Y. 206). From a careful reading of the decisions, it appears that the defendant must have actual knowledge in all events. The jury may consider the surrounding circumstances in determining whether or not the defendant had actual knowledge, but they must find such knowledge before they can apply the doctrine of last clear chance. (Bragg, etc. (supra); Wright v. Union Railway Co., (supra); Wolozynowski v. N.Y.C. RR. Co., (supra); Weitzman v. Nassau Electric RR. Co., 33 A.D. 585; Frazier v. Reinman, 230 A.D. 394.

This doctrine should be used with care in connection with negligence actions. Due to the laxity with which some judges have expressed it, its scope has been extended to cover cases not intended to be reached thereby. The most common error is the use of the words "contributory negligence" when the court means only negligence. The doctrine does not excuse contributory negligence. The purpose of the doctrine is not to excuse contributory negligence, but to place a limitation on the applicability of that doctrine. In determining whether the last clear chance doctrine can be invoked in a given instance, the following questions should be kept in mind:

(1) Did the plaintiff's negligence terminate or culminate before that of the defendant?

(2) Did the defendant have time to avoid injuring the plaintiff, by the exercise of due care and diligence, after discovering the peril of the latter?

If either of these is answered in the negative, the doctrine is not applicable to the case under consideration.

- J. E. P.

THE DOCTRINE OF INCORPORATION BY REFERENCE

The doctrine of incorporation of an extraneous act into a will by reference has caused the courts of this State considerable confusion. Although the adjudications will not support the contention that this State does not recognize incorporation by reference, the later cases have, in dictum, consistently disapproved of such theory. (Booth v. Baptist Church, 126 N.Y. 215). A similar situation exists in New Jersey, (Murray v. Lewis, 94 N.J.Eq. 681); while only Connecticutt has, as yet, carried its dislike of the doctrine into adjudication. (Hatheway v. Smith, 79 Conn. 506). The courts have, however, given full effect to reference made to unattested documents which were not a part of the will. They indicate that those instances do not violate the rule forbidding incorporation of unattested documents, but they do so without formulating any rule whereby one can determine for himself when such a situation exists.

The recent case of Matter of Rausch, (258 N.Y. 327) is an interesting illustration of how the courts treat this subject. Therein the testator gave to a trust company one-fifth of his residuary estate to be held in trust for his daughter "under the same terms and conditions embodied in the trust agreement made between myself "and the trust company" dated April 15, 1922, the principal to be disposed of as contained in said agreement, and which agreement is hereby made a part of my will, as if fully set forth herein." The court upheld the validity of the bequest. It assumed that the rule against incorporation existed in this State but stated that the rule was not violated. A gift to a trust company as trustee under a deed was compared with a gift to a corporation for the uses stated in its charger - "the identification of the donee is itself an expression of the gift." Although general principles were stated by the court, no practical test was given to guide us if another problem should arise.

The fact that the testator in the Rausch case might have been able to change the terms of the trust agreement after the drawing of the will and thereby change the effect of the disposition was not considered by the court. It seems that the same reasoning could be applied if such were done. That holding would thereby be contrary to Atwood v. Rhode Island Hospital Trust Co., (275 Fed. Rep. 513) wherein such a situation was presented. The majority of the court in the latter case held the disposal in the will to be invalid because it amounted to the reservation of a power to make future changes in the will by an instrument not duly executed. These cases cannot be reconciled. The question arises as to which is the better reasoned.

A perusal of the doctrine as applied in England, where it originated, and in those American States which have adopted it, and its treatment by the courts of this State may be of assistance in understanding its present status. By this means we may be able to see more clearly the reason for the holding in the Rausch case and formulate a rule which might be helpful in guiding us in the future.

In this State the power to dispose of property by will is a privilege granted to the individual by the State and its exercise is dependent upon statutory regulation. (Mat. Delano, 176 N.Y. 486). The statute says that a will must be signed, published and attested in a certain way. (Dec. Est. Law, sec. 21). From this the rule is deduced that the testator's purpose must be gathered from the will, and not from other documents which lack the prescribed marks of authenticity. (Mat. Fowles, 223 N.Y. 223). It is for this reason that the statutes on wills in this State must be closely adhered to and the intent of the legislature complied with.

In England, however, the Wills Act is treated as being in derogation of the common law, for the common law of England permits an individual to dispose of his property by will. (Hathaway v. Smith, supra). Therefore the English courts strictly construe the Wills Act and the doctrine of incorporation by reference has developed in that country and, consequently, has been adopted by a majority of the states in this country.

The case of Newton v. Seaman's Friend Society, (130 Mass. 91) gave the authorities on the English Law elaborate consideration and stated the requisites of incorporation as applied in those jurisdictions which have adopted it. The court said: "If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, . . . the paper so referred to, if it was in existence at the time of the execution, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such." (p. 93). The two essentials are: (1) It must be clearly designated by the description in the will, as a then existing paper; (2) it must be shown to have been in existence at the time when the will was executed, and must be identified. (Allen v. Maddock, 11 Moore P.D. 427).

The earlier cases have enunciated these rules as the law in this State. (Brown v. Clark, 77 N.Y. 369; Tonnele v. Hall, 4 N.Y. 140). The court in Brown v. Clark (supra) stated that "any testamentary document in existence at the execution of the will may be reference be incorporated into and become part of the will." The later case of Booth v. Baptist Church (supra) contradicted this statement and said the reverse. The statements in both cases, however, were obiter - as in neither was the doctrine of incorporation necessary to the decision. In the Booth case the memorandum was not in existence when the will was made and thereby failed to meet the requirements of the doctrine. This case, nevertheless, is often cited as establishing the doctrine against incorporation in this State, but in no case was its application directly before the court.

Assuming, as the courts do, that this State does not permit incorporation, let us see if we can establish a rule as to when they will give effect to a reference to an extraneous document or paper by a consideration of the cases where such was done.

The courts have given full effect to a reference made to account books for the purpose of canceling whatever indebtedness appeared therein, (Roberts v. Corning, 89 N.Y. 225), or to determine the extent to which general legacies were satisfied by advancements entered therein, (Langdon v. Astor's Executors, 16 N.Y. 9). Similarly where reference was made to a map on filed in the office of a certain register of deeds. (Tonnele v. Hall, supra) In these cases the acts referred to were non-testamentary, i.e. they did not purport to dispose of property belonging to the testator, and the acts were performed for their own sake and not to complement the will.

There have been cases where the will of another was treated as such an extraneous act. In Matter of Piffard, (111 N.Y. 410) the testator gave his daughter, S, power by will "heretofore or hereafter executed" to dispose of certain property and he directed that such share should be paid to her executors if she should predecease him. It was held that the will of the testator disposed of his property, that the class to take was described in general terms subject to be identified by her will as an extraneous act. There was a like decision upon like facts in Condit v. DeHart, (62 N.J.L. 78) which is followed by the Rausch case. The testator authorized his son to dispose of certain property by will. He then bequeathed and devised the same to such persons as the son should appoint by will. The son predeceased the testator leaving a will in which he purported to appoint his wife. The court found that the property did not go under the son's will, but that it was disposed of under the father's will to persons who were to be more precisely identified by reference to the son's will. Here, again, is a disposition of property in the testator's will with a general description of the beneficiaries, the complete identification being reserved for determination by an extraneous act, executed for its own purpose and not to complement the will.

The case of Matter of Fowles, (supra) has been regarded as violating the New York rule prohibiting incorporation by reference. Fowles and his wife were about to sail on the Lusitania. Before departing each validly executed a will. He provided in his will that a certain portion of his property should go pursuant to the provisions of such last will and testament as his wife should leave. It was held that the beneficiary named in the wife's will should take. In this, as well as the preceding cases, the property was disposed of by the testator's will and the class of persons to take were those named as beneficiaries in the will of his wife. Her will was an extraneous act performed for an independent purpose and not for the purpose of complementing his will.

There was no occasion to invoke the doctrine of incorporation in these cases. Similarly in the Rausch case which followed these cases. There is no distinction between a direction to pay the legatees named in another will as the Fowles case, and a direction to pay the executors named in a will as the Piffard case. The daughter's executors in the Piffard case did not take as individuals and only by reference to the will which appointed them could the nature of the trust and the names and interests of the

beneficiaries be learned which makes this case the same as the Rausch case. It seems, therefore, that this case is better reasoned than the Atwood case (supra) with which it is in conflict, as reference can be given full effect without violating the rule against incorporation.

A general rule may be deduced from these cases - a rule which the courts will be justified in applying to similar situations and which will be in harmony with previous decisions in this State. We may assume that the rule of this State is against incorporation by reference. Nevertheless we have seen that extraneous acts have been referred to where such act was non-testamentary. It seems that we can apply the following test: the will should (a) purport to dispose of the property; and (b) provide directions for determining the identity of the beneficiaries or whatever is intended to be identified by giving a general description of them; but (c) the means so provided should not be any act whose sole or chief purpose is that of complementing the will. It should have the force of an independent legal transaction. On this basis the will of another, non-existent at the time, may be that extraneous act, or books of account to be created in the future, and as in the Rausch case a trust agreement may be such an act.

- H. A. L.

LIABILITY FOR THE COMMUNICATION OF FIRE

Like countless other topics of the law, the principles and limitations attendant upon liability for the communication of fire have not been born of the moment. Rather they represent the gradual evolution of authority, traceable throughout the texts and reported decisions, and even now absolute harmony does not prevail. In its present stand on the question, New York State is practically alone, and not infrequently that stand is the object of pointed attacks by courts of foreign jurisdictions. Tested by the rules of pure logic our position may admit of criticism, but considerations of sound public policy incline to approbation of it.

A fire negligently started upon my land communicates to that of A, and thence to B's and across his to C's, causing damage to each. To whom am I, the wrong-doer, liable? New York says only to the adjoining owner - beyond that the damage is remote; other states grant a recovery to each. Not only, they say, is there liability for the first building (or land) consumed but for all subsequently destroyed by the same continuous conflagration, without regard to the distance the fire runs or the time it is in progress. (1 Sutherland on Damages (4th) 67). The negligent fire is regarded as a unity. It reaches the last object as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force just as directly as it does the first.

At common law the responsibility of one making use of fire was very great. Every master of a house or chamber was bound to so keep his fire as to prevent it from occasioning injury to his neighbors. If a fire broke out in a house and burned an adjoining dwelling or did other damage, the master of the house in which the fire began was liable to make compensation. It was not necessary to prove negligence; the law presumed it. (Year Book, 2 H. 4, pl. 18; 1 Black Com. 431). The hardship of the rule was well recognized, but so firmly fixed was this custom, that a statute was necessary to soften its rigor. Such a statute was enacted in 1707 and provided, "No action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, for their own loss is sufficient punishment for their own or their servant's carelessness." (6 Anne, c. 31). The statute was later amended (14 Geo. III, c. 78) and the exemption was extended to fires started elsewhere than in the house or chamber. It read, "No action, suit, or process whatever shall be had against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall after the 24th day of June, 1774, accidentally begin, any law, usage or custom to the contrary notwithstanding."

It is generally understood that English law as embraced in statutes became part of the common law of the colonies. Chancellor Kent says, "It is the established doctrine that English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of law, constitute a part

of the common law of this country." (I Kent's Com. (4th) 472). And by Section 16 of Article I of the existing Constitution of this State, such parts of the common law and of the acts of the legislature of the colony of New York as together formed the law of the said colony on the 19th day of April, 1775, 'shall be and continue the law of this State, subject to such alterations as the legislature shall make concerning the same.' The statutes of England, above quoted, were in force on April 19th, 1775 and are therefore part of the common law of this State. They were so recognized in Lansing v. Stone, (37 Barb. 15), though the applicability of the latter of the two was questioned in a case decided by a Wisconsin court. (Spaulding v. Chicago & N.W. RR. Co., 30 Wis. 110). It was there urged that since at the time the statute of 14 Geo. III was enacted we were on the verge of war with England, our colonists could not be presumed to be conversant with the statute, and therefore did not adopt it into the legal structure of the new states. But New York has been of a different mind.

Whether or not the statute extended to cases of negligence was for a long time a disputed question. But it was finally held that it did not apply to fires negligently or knowingly kindled. (Filliter v. Phippard, 11 Q.B. 347 (1847)). The Lansing case (supra), however, though decided at a later date, shared the belief of Blackstone that the statute also covered instances of fires negligently started. The question presented would seem to make peculiarly applicable the remarks of Chief Justice Marshall in Elmendorf v. Taylor, (10 Wheat. 152, 159), that "No court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding." The wisdom of these words cannot be seriously doubted. If we elect to be bound by a foreign statute, we must of necessity accept the construction which the courts of that jurisdiction have given to it. Subsequent cases permitting a recovery indicate that the conclusion reached in the Lansing case was not long approved. Both in England and the United States verdicts in cases where fires have been negligently kindled are now not uncommon. When negligence is shown, liability follows. (I Eng. Rul. Cas. 208; 11 R.C.L. 491; Hays v. Miller, 6 Hun 322; Higgins v. Dewey, 107 Mass. 494; Miller v. Martin, 16 Mo. 508; Fahn v. Reichart, 8 Wis. 255; Note in 36 L.R.A. (N.S.) 194). And what in each case is negligence is for the jury to determine. It is further the well-established rule that the destruction of property by fire, either upon the premises where it started or on other property to which it has communicated, does not, in the absence of a statute, raise a presumption of negligence. That is an element to be proved by the plaintiff in each case. (Catron v. Nichols, 81 Mo. 80; Note in 30 Am.S.R. 502).

Negligence once established in the original burning, in a case where the fire has spread to other premises, the question as to the extent of liability remains. Generally speaking, there is liability for all damage that is the proximate result of the negligent act. On this the authorities are in accord; not so, however, as to what results are proximate. Here they diverge. The rule

in New York is one of limited liability.

Among the first decisions in this State on the question were Ryan v. N.Y.C. RR. Co., (35 N.Y. 210) and Webb v. R., W. & O. RR. Co., (49 N.Y. 420). Different results were reached by the court on seemingly indistinguishable facts. In the former, sparks from the defendant's locomotive fell upon and ignited a shed upon the defendant's right of way; sparks from the burning shed ignited and destroyed the house of the plaintiff. A recovery was denied, the court holding that the plaintiff's loss was remote and not traceable directly to the defendant's negligence. In the latter, live coals negligently dropped from the defendant's locomotive set fire to a railroad tie; the fire spread to an accumulation of dried grass upon the right of way, and thence to the plaintiff's lands, destroying them. The plaintiff prevailed. The loss was held proximate. The court did not disapprove the ruling in the Ryan case; it accepted the application of the rule to the facts therein as justified. Why there was a lack of causal connection in the communication of the fire from a building, as in the first instance, and not in the latter where it spread on the ground from one object to another, is not quote clear.

In O'Neill v. N.Y., O. & W. Ry. Co., (115 N.Y. 579) the action was brought to recover damages for injuries to woodlands of the plaintiff, fire negligently started by the defendant having spread over intervening lands to those of the plaintiff. On appeal the defendant claimed that the damages were too remote, but it was held that the question not having been brought up below, 'it could not be listened to'. The court said, however, "The fact that land of a third party intervened between the woodland of the plaintiff and the defendant's road cannot be doubted, but that alone is not decisive." (p. 584). From this it is quite apparent that the court did not deem an absolute rule of liability had been injected into our law by virtue of the Ryan or Webb cases (supra).

The point, however, has been settled in this State since the case of Hoffman v. King, (160 N.Y. 618). That was an action to recover damages occasioned by a fire negligently set by defendant and which spread across intervening land to the plaintiff's property. Recovery was denied. The cases on the subject were extensively reviewed and the rule of limited liability adopted; damage beyond the adjoining owner was held remote. The court said, "If a person lights a fire upon his own premises, and fire spreads upon abutting lands, the damage done is the proximate result of the act and a liability exists, and this, we think, is the limit." It was admitted that such a limitation of the rule would deprive many persons of a right of action for damages. But such a limitation was deemed wiser and more just. The court continued, "The limitation may be somewhat arbitrary but it recognizes the principle that we should live and let live." (p. 628). And it was further held that where the evidence is undisputed, the question as to what is proximate cause is always for the court and not for the jury. This case has never been questioned in New York but has been distinctly approved, and followed. (Van Inwegen v. Port

Jervis, Monticello & N.Y. RR. Co., 165 N.Y. 625; Dougherty v. King, 165 N.Y. 657; Rose v. Penna. Ry. Co., 236 N.Y. 568; Moore v. Van Beuren & N.Y. Bill Posting Co., 208 A.D. 352). In reaching the result that it did the court was apparently more influenced by the fact that the opposite doctrine would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate, than by strict regard to the logic of cause and effect. Legal logic gave place to a regard for public interests.

The courts of foreign jurisdictions have been almost unanimous in their dissent from the New York rule. But one case, (Penna. Ry. Co. v. Kerr, 62 Pa. St. 353), so far as the writer's search revealed, declared in favor of the rule of limited liability. That was a case almost identical in its facts with the Ryan case (supra), and the same result was reached. Its authority, however, in that jurisdiction has since been considerably weakened, if not entirely disregarded. (Penna. Ry. Co. v. Hope, 80 Pa. St. 373; Penna. & N.Y. Canal & RR. Co. v. Lacey, 89 Pa. St. 458).

The other courts hold that the question of natural and proximate cause and effect is not only to be left to the jury to determine, but that the liability extends just as far as the cause can be traced in effects which follow the prime cause without some intervening agency, either active or passive, changing, diverting, modifying, or affecting in some degree the operation of the prime cause. In short, the doctrine of proximate cause, as understood and applied in practically all cases involving tort liability, is the determining factor. If the damage for which compensation is sought is the direct and natural result of the negligence alleged, and no intervening cause operates to increase the hazard, then the courts should be unmindful of boundaries and lot lines, and of ownership. The damage is the same and flows from the same cause whether the land belongs to one person or in severalty, to two. The question of remoteness cannot depend upon the title to land, since the line which divides the ownership of land neither stops the fire or carries it forward. In the interes of pure logic, this result must inevitably follow. And so the cases have held. (The Penna. Co. v. Whitlock, 99 Ind. 16; Henry v. Southern Pacific Ry. Co., 50 Cal. 176; St. Louis Southwestern Ry. Co. of Texas v. Gentry, (Tex. Civ. App., 1904), 80 S.W. 844; Toledo P. & W. RR. Co. v. Pindar, 53 Ill. 447; Kenny v. Hannibal & St. J. RR. Co., 70 Mo. 252; D. L. & W. RR. Co. v. Salmon, 39 N.J.L. 300; Crandall v. Goodrich Trans. Co., 16 Fed. Rep. 75; Milwaukee & St. Paul RR. Co. v. Kellogg 94 U.S. 469; Adams v. Young, 44 Ohio St. 80; Perley v. Eastern RR. Co., 98 Mass. 414). Nor do the English cases recognize the distinction noted in the New York cases. (Smith v. London & Southwestern Ry. Co., L.R. 6 C.P. 14; 18 E.R.C. 726; Note in 6 Am. Rep. 599; 1 Cooley on Torts (4th) 127).

However much the rules of logic may be offended, in New York ownership of adjoining land seems to be the criterion of liability. Whether the loss extends to one, two, or three buildings, situated thereon, there is liability to make compensation for all, and this though the second and third may have ignited from sparks released

by the first. The case of Frace v. N.Y., Lake Erie and Western Ry. Co., (143 N.Y. 182) was an action to recover for a barn and an hotel destroyed by fire caused by sparks emitted from a defective smoke stack on defendant's locomotive. The barn caught first and from it fire spread to the hotel. The trial judge instructed the jury that in finding a verdict for the value of the hotel, it must find "that the same was destroyed by reason of the fire being communicated thereto directly from the engine, or without the assistance of other agencies and arising from other causes." (p.183) On appeal it was held that no error was committed to the prejudice of the defendant. The case was reversed on other grounds, so the correctness of the judge's instruction was not necessarily decided. Subsequent cases, however, indicate that the trial judge was in error. Snook v. N.Y.C. & H.R. RR. Co., (90 Misc. 69) was an action to recover for the destruction of several buildings due to a fire originating in plaintiff's warehouse, in which was stored a quantity of lime. The defendant's alleged negligence lay in the construction of a ditch which permitted waters from an unprecedented rain to reach the lime and ignite the building, from which others in turn were fired. On appeal by the defendant, the court failed to find negligence in the acts of the defendant, but said that had that conclusion been possible, the defendant would have been liable for all buildings burned. A like result was reached in Davies v. D.L. & W. RR. Co., (215 N.Y. 181). The defendant was held liable for all buildings destroyed. There it was said, "If the origin of the fire was attributable to negligence of the defendant, the entire destruction of property caused by it was a proximate result of that negligence. The mere fact that the fire may have spread from one building to the other, did not break the causal connection between the defendant's negligence and the entire damage done." (p. 184).

It will be noted that cases thus far considered involved situations where damage resulted from the 'spread' of fire. It remains to be considered what the rule is, if a fire negligently set upon a defendant's land proceeds by sparks or flames across intervening land, nothing upon which is ignited, directly to the buildings of a plaintiff situated on premises not contiguous to the defendant's premises and ignites one of them. Until the recent case of Homac Corporation v. Sun Oil Co., (258 N.Y. 462) a decision on that point had apparently never been made in this State. In that case the defendant, a distributor of gasoline, maintained storage tanks on one side of a bare dirt roadway. On a certain night the gasoline in one of the storage tanks exploded; fire ensued and as the result of sparks or the intense heat it was communicated to the plaintiff's premises situated directly across the way. Fire broke out in one building, and then another, with the result that many buildings were destroyed. Negligence on the part of the defendant having been shown, a verdict for the plaintiff for all the damage done was unanimously affirmed in the Court of Appeals.

No fault can be found with the ruling. The Hoffman case (supra) cannot be regarded as holding that compensation for damage by fire must, in every instance, be limited to the adjoining owner. It

merely established the rule that damage was remote when it resulted from the spread of fire from intervening lands. The Homac case, therefore, came to the Court of Appeals unfettered by precedent. The rule of limited liability, in cases where it applied, was expressly recognized by the court as still subsisting in this State, but the factual situation presented by the case in issue made necessary a different ruling. The result reached by the court seems inescapable. Nothing intervened between the negligence of the defendant and the loss of the plaintiff to make that loss remote. The narrow roadway separated their property but it furnished no element in the train of events which culminated in the firing of the defendant's buildings. Nothing on it took fire.

However distant a plaintiff's property may be, where sparks communicate directly to it and fire results, no plausible argument, can, in the opinion of the writer, be advanced why the ensuing loss is not legally and logically traceable to the first act of negligence which set in motion the destructive force. Where sparks are carried through the air, intervening land, no part of which has been touched by the fire, provides no element of causation, and a recovery should be allowed. A strong wind may conceivably carry the tiny sparks for many miles with a resulting loss which no one could anticipate, but to deny a recovery because of any alleged intervention of the elements is to condone carelessness at a time when care is most needed.

It is not surprising that a search of foreign cases has not revealed a decision based on any argument similar to that presented in the Homac case (supra) for, as already pointed out, no distinction is drawn among foreign jurists as to the proximity of the lands damaged to those on which the fire originates. Negligence being shown, there is a recovery for all loss directly attributable thereto and whether it communicates through the air or across intervening lands is immaterial.

Thus far, this paper has been confined to a discussion of the principles of the common law as now accepted and applied to cases involving fire losses, both in this State and in foreign jurisdictions. In closing, however, brief mention should be made of a statutory provision to be noted in the Conservation Law of this State (Section 56), which deals with the liability for the negligent setting of forest fires. For such injury to State lands, the wrong-doer is liable to the State in treble damages and in addition to a penalty of $10.00 for every tree killed. He is also liable to private persons for the damage done, 'however distant from the place where the fire was set or started and notwithstanding the same may have burned over and across several separate, intervening and sistinct tracts, parcels or ownerships of land'. And in the case of a railroad company, where fire originates upon its right of way there is a prima facie presumption that the fire was caused by negligence of the railroad company. This statutory provision is not to be construed as applicable to cases other than those involving forest fires.

A distinction should likewise be noted in cases involving

the willful burning of one's own or another's property. In such cases a more extended rule of damages is applicable and the willful wrong-doer is held liable on general principles for all the consequences of his wrongful act, however remote the results or overwhelming the disaster, (Allison v. Chandler, 11 Mich. 542; Field on Damages, 51)

-W. L. B.

CURRENT DECISIONS

* * *

FELLOW SERVANTS - SECTION 59 OF VEHICLE AND TRAFFIC LAW

Section 59 of the Vehicle and Traffic Law was enacted by our legislators in an attempt to fix liability for injuries caused by the negligent operation of an automobile by one other than the owner. The section reads in part as follows: "Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to a person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner." Its language seems to be iron-clad and capable of only one interpretation, - liability on the part of the owner for such injuries when the driver had the owner's permission to operate the vehicle.

Yet the apparent effect of the law has been circumscribed by adherence to old and firmly rooted rules and ideas. In the case of Psota v. Long Island RR. Co., (246 N.Y. 388), as one example, the courts seemingly gave the above interpretation to the statute, yet brought in the old principle of non-liability on the part of the master for the acts of his servant or agent unless the latter was acting within the scope of his employment.

The querry here raised is whether the section is affected by the fellow-servant doctrine of the common law.

In Labott on Master and Servant,((2d), Sec. 1393), the doctrine of common employment is stated as follows: "A master is not bound to indemnify one servant for injuries caused by the negligence of another servant in the same common employment as himself, unless the negligent servant was the master's representative." Outstanding cases dealing with the origin and development of the doctrine are Preestly v. Fowler, (3 Mees & W. 1), Murray v. South Carolina R. Co., (1 McCull. L. 385), and Farwell v. Boston & W.R. Corp., (4 Met. 49).

From a perusal of cases on the subject, it would seem that the foundation of the doctrine is laid in public policy and expediency rather than in abstract or natural justice. In Labott on Master and Servant, ((2d), Sec. 1398) it was said, "The position taken by the court simply amounts to this:- that on the grounds of public policy, injuries resulting from a co-servant's negligence should as a general rule, and in the absence of some special reason to the contrary, be regarded as beyond the purview of the principle of respondeat superior." The consideration upon which most reliance seems to be placed is that the practical tendency of the doctrine is to make a servant more cautious in performing his duties and more watchful as to the character and qualifications of his co-employee; the result of the influence

thus exerted is that tangible benefits are reaped by everyone concerned,- by the servant himself, by his master, and by strangers whose personal safety or business interests are more or less dependent upon the manner in which he performs his duties. (Crispin v. Babbitt, 81 N.Y. 516; Ryan v. Cumberland Valley R. Co., 23 Pa. 384; Chicago, M. & St. P. R. Co. v. Ross, 112 U.S. 377; Louisville & N.R.Co. v. Lahr, 86 Tenn. 335).

Previous to the enactment of section 59 the law was that the owner of an automobile was liable for injuries caused by its negligent operation in the hands of another only when that other was operating it in the business of the owner. (Potts v. Pardu, 220 N.Y. 431; VanBlaricom v. Dodgson, 220 N.Y. 111; Reilly v. Connable, 214 N.Y. 586).

When the question of a fellow servant was involved, the possibility of the owner being liable was made even smaller. If the injured person and negligent driver of the automobile were co-employees, the fellow-servant doctrine was applied and relief to the injured party was denied. (Erjauschek v. Kramer, 141 A.D. 545; Chekatouskay v. Henderson, 190 N.Y.S. 586).

Keeping in mind the previous inhibitions to a recovery in fellow-servant cases, the question arises whether the legislature by incorporating section 282-e of the old Highway Law into section 59 of the Vehicle and Traffic Law intended to create a sweeping liability on all automobile owners, or whether it intended to retain the defense of the fellow-servant rule in cases not provided for under the Workman's Compensation Act. Two recent cases, Fay v. DeCamp, (257 N.Y. 407) and Glennie v. Falls Equipment Co., Inc., (142 Misc. 316), seem to bear out the latter construction.

In the first case, plaintiff was employed by defendant as a chambermaid. While being transported in defendant's automobile from defendant's home in Rye, New York, to his summer camp in Old Forge, New York, she was injured as a result of the negligence of the chauffeur, who was employed by defendant. Plaintiff elected to bring this action to recover at common law against her employer for the negligence of his chauffeur. The court denied plaintiff a recovery on the ground that she and the chauffeur were fellow-servants of the defendant. At page 410 of the opinion per Judge Crane, the court said, "* * * Both were performing work reasonably connected with the running and maintenance of the defendant's summer places in accordance with his tastes * * * The plaintiff had not ceased her employment or terminated her duties * * * The risks connected with such transportation in order to perform her duties and to continue her daily tasks were reasonably to be anticipated and considered when entering his employ." It is to be noted that section 59 was not considered here, the case being decided solely on the basis of the fellow-servant doctrine.

The foundation of plaintiff's action would seem to be found in the exception within the statement of the common-employment doctrine; i.e., "The master is not bound to indemnify * * * unless the negligent servant was the master's representative."

While Glennie v. Falls Equipment Co. Inc. (supra) differs in facual detail, still it presents the same underlying problem found in Fay v. DeCamp (supra). Plaintiff Glennie and defendant Martin were co-employees of the defendant corporation, - Glennie being its president and Martin one of its salesmen. At the time plaintiff sustained his injuries, Martin was driving the automobile at Glennie's request. Plaintiff sought to hold the defendant corporation liable on the theory that section 59 of the Vehicle and Traffic Law gives a cause of action in favor of every injured person against every owner of a motor vehicle where plaintiff can show his freedom from contributory negligence and can also show the two elements required by the statute, i.e., permission of the owner and negligent operation by the driver.

The court, however, dismissed the complaint as to the defendant corporation saying that the section was of no avail to the plaintiff; that it was not so inclusive in its meaning as plaintiff asserted; that the machine in which plaintiff was riding was being drive on the business of the owner, the defendant corporation, and in the opinion of the court the provisions of section 59 did not give to the plaintiff, or any other party, a protection different from that given by the common law.

The essence of this case (insofar as the topic under consideration is concerned) is that the circumstance of the driver being a fellow servant to the plaintiff defeats the plaintiff in his action to recover damages from the owner for injuries sustained as a result of the driver's negligence. By the same token, then, if plaintiff Fay (in Fay v. DeCamp, supra) had sued under section 59 of the Vehicle and Traffic Law, she would have been met and defeated, in essentially the same language, by the fellow-servant doctrine.

It is therefore submitted that section 59 of the Vehicla and Traffic Law has not done away with the fellow-servant doctrine. It is true that the statute did create a liability where none existed at common law. It did eliminate the old rule that the owner of a vehicle was not liable for negligent injury, caused in its operation by another, unless, at the time, it was being used on the business of its owner. It does operate to fix liability on the owner when his automobile is being used or operated by another with his permission. But farther than th t it did not go; it did not otherwise change any of the rules of liability; that is, it did not extend the liability of the master for the acts of his servants. (Psota v. Long Island RR. Co., 246 N.Y. 388). The legislature, in passing such statute, had in mind the protection of persons injured by cars driven with the permission of the owner, (Gochee v. Wagner, 357 N.Y. 344). And, since the legislature may not be presumed to make any innovation upon the common law further than is required by the mischief sought to be remedied, (Dean v. Metropolitan Elevated R.R. Co., 119 N.Y. 540, 547), it would seem that, both by the rules of construction and judicial interpretation, the section in question was not intended to eliminate the fellow-servant doctrine in relation to automobiles.

- L. C. R.

* * *

PRACTICE - JURISDICTION OF TORT ACTIONS BETWEEN NON-RESIDENTS

Two Pennsylvanians were sole participants in an automobile accident in Cattaraugus County. One sued the other in the Supreme Court in this State. Justice Noonan dismissed the complaint because the parties were non-residents. (Gainer v. Donner, 140 Misc. 841). There is no question "that the court may retain jurisdiction." Tort actions, being transitory, may be tried wherever the plaintiff may be. (Murnan v. Wabash RR. Co., 246 N.Y. 244; Gregonis v. Coal Co., 235 N.Y. 152; Wertheimer v. Clergue, 53 A.D. 122; Burdick v. Freeman, 46 Hun 138). Justice Noonan writes, the question is, "whether or not the court ought to retain jurisdiction." He assumes that discretion to deny jurisdiction exists, without giving reasoning or precedent for the assumption, and decides that jurisdiction should be denied.

Two other Pennsylvanians had an accident in Tioga County. Again the action was brought in this State. The defendant, relying on Gainer v. Donner (supra) moved to dismiss the complaint. Justice Personius denied the motion on grounds of convenience to witnesses. He says, "Even if this court may in its discretion retain or refuse to retain jurisdiction of this action, we think it should be retained." (Hunter v. Hosmer, 142 Misc. 382). Justice Noonan's holding is questioned. "We are not willing to concur" beyond holding "That our courts will as a matter of public policy refuse to retain jurisdiction' in an action between non-residents for tort arising outside the State." "On principle we think the courts of this State should be open to determine causes of action in tort arising within the State and therefore governed by our laws." (p. 383)

Both cases hold there is jurisdiction. The earlier holds that it is to be exercised in the sound discretion of the court; the later one holds that there should be no discretion, that jurisdiction should be mandatory. There are no reported decisions before these on the situation presented. Tort cases in which both the tort and the parties are creatures of another state are numerous. The holding has always been that jurisdiction in the courts of this State is discretionary "because the courts should not be vexed with litigations between non-residents over causes of action arising outside our territorial limits." (Ferguson v. Neilson, 11 N.Y.Supp. 524). That reason seems to apply as forcefully to an action between non-residents concerning a tort committed in the State. Nothing of prime interest to this State is involved. There is no question of a breach of the peace. The damaged property is not of the mass of New York State goods. The persons involved are not units in the New York State political system. Injury or destruction of the property or the persons can but remotely affect the welfare of this State. Crowded trial calendars and expensive court machinery are every present arguments for reasonable restrictions on litiation. Where that litigation can produce no domestic benefits, and might actually hamper domestic justice, it would seem eminently reasonable to allow the

trial court discretion to hear or dismiss the action, the decision being controlled by the condition of the calendar, the possibility of a fair trial in the state of the parties' residence, and the convenience of witnesses.

- G. R. B.

* * *

INHERITANCE BY ADOPTED CHILD - DOMESTIC RELATIONS LAW, SEC. 114

The right of an adopted child to inherit from the collateral relatives of its foster parents has been the subject of conflicting decisions by the courts of this State. The confusion seems unnecessary, since the problem involved is purely one of statutory construction.

The right of adoption was not embodied in the common law of England, and in New York the existence of the institution as well as the rights and obligations which it entails are dependent upon legislative enactment. (Carpenter v. Buffalo General Electric Co., 213 N.Y. 101). Adoption was first permitted by Chap. 830 of the Laws of 1873. Under that statute the legal relation of parent and child was established between the adopted child and the foster parent, but the right of inheritance was expressly denied. The law was amended in 1887 (Chap. 703, Laws of 1887) to confer the right of inheritance upon the adopted child. The statute today is in substance identical with the provision then enacted. The appropriate portion of section 114 of the Domestic Relations Law reads as follows: "His (the adopted child's) rights of inheritance and succession from his natural parents remain unaffected by such adoption. The foster parent or parents and the person adopted sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, ... and such right of inheritance extends to the heirs and next of kin of the person adopted, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, ..."

Since adoption is exclusively a matter of statute, failure t provide that the adopted child is to be considered as an heir and next of kin of the collateral relatives of his foster parent would seem to preclude his inheritance from them. In 1906 it was so held in a well considered opinion in the case of Kettell v. Baxter, (50 Misc. 428). An adopted daughter was not permitted to inherit as an heir at law of her foster mother's sister. The court said, "Adoption is the taking of a stranger in the blood as one's own child. The proceeding of adoption and the relation established is personal to the foster parent and the child. The statute gives to them all the rights to be derived from the legal relation of parent and child, including the 'right of inheritance from each other'. The right is not given, however, either expressly or by implication, to the child to inherit through the foster parent from his

collateral kin. In other words the child becomes heir only to the foster parent. This right of inheritance flows from the artificial relation established at the request of the one and with the consent of the other. The adoption proceedings perpetuate the desire of the parent that the child shall be his heir. But a stranger to the adoption proceedings, who has never recognized the existence of any artificial relation, should not have his property diverted from the natural course of descent . . . Heirship from a source so remote must be grounded in the statute and cannot be implied." (pp. 431-432) (Followed in Matter of Haight, 63 Misc. 624).

This continued to be the law on the subject until in 1914 the Court of Appeals delivered its opinion in Carpenter v. Buffalo General Electric Co. (supra). There, upon the death of an adopted person without wife or issue, an action for death by wrongful act was brought by a sister of the foster parent, previously deceased. Her right to maintain the action was challenged upon the ground that the surviving natural father of the adopted decedent was his sole next of kin under Decedent Estate Law, sec. 98, sub. 7. The court held that in effect the statute (Dom. Rel. Law, sec. 114) cut off from inheritance the natural parents of the adopted child and gave him the same heirs and next of kin he would have possessed had his foster parent actually borne him. The uncles and aunts by adoption of the decedent were his next of kin. The question whether the decedent was an heir of his uncles and aunts by adoption was not involved. The decision was obviously correct, but the opinion was loosely expressed and the assertions obiter were dangerously inclusive. It was observed, "Reading the several laws enacted in this state the conclusion is irrestible that the policy of the legislature has been to extend the artificial relations created by adoption to the relation existing by nature." (pp. 106-107).

In the next adoption case to arise, (U.S. Trust Co. v. Hoyt, 115 Misc. 663) it was held, on the basis of the sentence just quoted, that an adopted daughter of decedent's brother was one of the decedent's next of kin. "If this statute (Dom. Rel. Law, sec. 114) is to be read as allowing representation by collaterals through the foster parent, as was held in the case cited (Carpenter v. Buffalo G.E. Co., supra), its scope and meaning are such as to include the precisely correlative right of the foster child to take by inheritance through the foster parent from collateral relatives. Strictly construed the statute excludes representation in both instances. Construed to give inheritable blood by adoption in one instance, it must give it in the other, according to every reasonable implication of legislative intent . . . ." (pp. 670-671). This decision was affirmed without opinion by both the Appellate Division (173 A.D. 930) and the Court of Appeals (223 N.Y. 616).

The confusion into which the law on the subject was thrown by this case is indicated by an annotation in McKinney's Consolidated Laws (Dom. Rel. Law, sec. 114, p. 321), which states that

an adopted child may inherit from the collateral kin of the foster parent and that the collateral kin of the foster parent may inherit from the adopted child.

Since 1917, however, the courts have expressed distrust of the misleading dictum in the Carpenter case (supra) and have returned to the strict interpretation of the statute laid down in Kettell v. Baxter (supra). (Winkler v. N.Y. Car Wheel Co., 181 A.D. 239; Hopkins v. Hopkins, 202 A.D. 606; Matter of Powell, 112 Misc. 74). In the recent decision of Matter of Hall, (234 A.D. 151) the court refused to follow U.S. Trust Co. v. Hoyt (supra) and held that the adopted daughter of an uncle of the decedent could not share in the estate of the decedent as a distributee. The correct rule is that one may not adopt heirs for third persons.

-A. H. P.

* * *

SALES - APPROPRIATION OF CORPORATE STOCK TO A CONTRACT OF SALE

Shares of corporate stock, which are among the most extensively sold of man's possessions, are valuable only because of the interest in corporate property which they represent. This fact makes their exact status as property or "goods" under the Sales Act questionable. This status was determined as to Section 100, sub. 4, of the Personal Property Law in Wills v. Investor's Bankstock Corp., (257 N.Y. 451). Sub. 4 of Section 100 of the Personal Property Law reads (underlining mine): "Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made."

In Wills v. Investor's Bankstock Corp. (supra) the plaintiff purchased certain stocks from the defendant, a dealer in securities, through a broker. The defendant though not at the time in possession of such stock wrote confirming the sale. The plaintiff then paid the broker for the stock and he in turn paid the defendant. Later the defendant sent a letter in response to the broker's request stating that the stock had been placed in transfer to the name of the plaintiff. At that time the defendant had not as yet come into possession of such stock though it had been purchased. The dealer had become bankrupt before the stock was delivered to the defendant who now seeks to hold it in partial satisfaction of a large claim which the defendant has against the broker. The plaintiff is suing on the theory of conversion claiming that title to the stock had passed as it had been unconditionally appropriated to the contract which would pass title under sub. 4 of section 100 of the Personal Property Law. The Court of Appeals

decided that corporate stock was included within the purview of that section and controlled by the rules as to unconditional appropriation, but that in this particular case the requirements of those rules had not been complied with.

The question as to whether corporate stock was such a commodity as to be within the purview of the Sales Act or within the meaning of the word "goods" as there used was not discussed except by Judge Crane in the opinion by which he dissented from the decision of the court on that particular ground. This is a point which has never been directly raised and discussed by our courts.

While this particular question has never arisen, yet, the status of corporate stock has to some extent been repeatedly raised in connection with statutes of frauds. The English statute, unlike our own, applies only to "goods, wares and merchandise". The question as to whether corporate stocks were such "goods, wares and merchandise" first arose in Pickering v. Appleby, (1 Com. Rep. 354) when a full court of twelve judges were evenly divided on the question. Later in Humble v. Mitchell (11 Ad. & El. 205) the English court held that a contract for the sale of corporate stock is not a contract for the sale of "goods, wares and merchandise", as such words comprehended only corporeal moveable property, and shares of stock are mere choses in action and not capable of delivery. This latter rule has been followed by the English courts since then.

In the United States the leading case is Tisdale v. Harris, (20 Pick. (Mass.) 9) where it was held that stocks were within the meaning of the word "goods" as used in the Massachusetts Statute of Frauds. This case has been consistently followed in this country and is almost universally accepted by our courts. The Statutes of Frauds in many states apply only to "goods" which is construed so as to include corporate stocks. (Illinois-Indiana Fair Assn. v. Phillips, 328 Ill. 368; Sprague v. Hasie, 155 Mich. 30; Davis Laundry and Cleaning Co. v. Whitmore, 92 Ohio St. 44) In other states where the statutes cover "goods, wares and merchandise" corporate stocks are considered as included. (Coleman v. St. Paul & Tacoma Lumber Co., 110 Wash. 259). New York also considers corporate stocks as within our statute (Nichols v. Clark, 40 Misc. 107), but of course that is to be expected as our statute expressly includes choses in action.

The courts of this country are almost universally in accord with the theory that such words as "goods" or "goods, wares, and merchandise" include corporate stocks when used in a Statute of Frauds, a part of the Sales Act. It would therefore seem that this entire act, intended to cover the sale of comodities, and especially this section dealing with the sale of "goods" would include within its purview corporate stocks which are held to be "goods" or "goods, wares and merchandise" as those words are used elsewhere in the same act. The courts of some foreign jurisdictions have held that the provisions of their Sales Acts are applicable to the sale of corporate stocks. (Hopkins et al v. Bronough, 281 Fed. 799).

As corporate stocks are goods" under the section they also may be, and in this case, are "unascertained goods". The value of each share of a given issue by a given corporation is the same as of every other share of the same issue. A person purchasing a share of stock purchases any share of that issue, any one of a large number of similar and equally desirable articles. Their nature and mercantile usage makes the delivery of any share the equivalent of the delivery of any other share and the one which is to satisfy the contract is unascertained until the moment it is set apart and applied to the performance of the contract.

The Personal Property Law, by section 100, sub. 4, defines what is necessary to pass title to unascertained goods under a contract of sale. They must be "unconditionally appropriated" to the contract. What unconditional appropriation is has been repeatedly adjudicated. To constitute unconditional appropriation there must be a setting apart of specific property in performance of the contract by the seller with the assent of the buyer or by the buyer with the assent of the seller. (Cooke v. Millard, 65 N.Y. 352). Corporate stock is as capable of being unconditionally appropriated according to the above definition of the terms as is any other type of unascertained or fungible goods with respect to which the courts have adjudicated and is equally controlled by the rule. Therefore in a contract for the sale of shares of corporate stock it only remains to be decided in each case whether or not the facts of that case satisfy the established rule as to what constitutes unconditional appropriation in order to pass title.

- L. P. W.

* * *

WILLS - REPUBLICATION OF WILL AS EFFECTED BY SUBSEQUENT CODICIL

Does a codicil constitute a republication of a will as of the date of former, so that a widow may be invested of a right of election under a will executed prior to August 30th, 1930, if the codicil is executed thereafter? Section 18 of the (New) Dec. Est. Law recites, "where a testator dies after August 30, 1930 and leaves a will thereafter executed . . . . a right of election is given to the surviving spouse to take his or her share of estates as in intestacy.

Mr. Greenberg executed a will dated December 27, 1927, by the terms of which he cut off his wife with a bequest of one dollar. On October 30, 1930, he executed a codicil to his will. Of the fifteen dispositive provisions of the will, the codicil altered all but three. One of the unaltered three was the one dollar bequest to Mrs. Greenberg. Mr. Greenberg died in 1931. The Surrogate held that the execution of the codicil made the will subject to the statute, thus giving the widow the right of election thereunder. (Mat. Greenberg, 141 Misc. 873 (Surr. Ct.

Kings Co. 1931); Mat Simeone, 141 Misc. 737 (Surr. Ct. Westchester Co. 1931) is in accord.)

The instant cases adjudicate a question which was expected to arise under the new statute. (See (1929) 6 N.Y.U. L. Rev.) The determination is just and within the law. To substantiate its decision the court resorted to a dual line of reasoning. Some reliance was placed upon the rule that a will is republished as of the date of the codicil. Many cases support this theory. (Mat. Howland v. Union Theological Seminary, 5 N.Y. 193 (1851); Van Alstyne v. Van Alstyne, 28 N.Y. 325 (1863); Cook v. White, 43 A.D. 388 (1899), affd. 168 N.Y. 588; Mat. Campbell, 170 N.Y. 84 (1902); Mat. Bann, 219 N.Y. 263 (1916)). In Caulfield v. Sullivan, (85 N.Y. 153, 160), it is said, "The provisions of the will may be treated as embodied in the codicil and both may be treated as if executed and published at the same time." The obvious fact that republication was inconsistent with the testator's intent, in the case at bar, did not deter the surrogate in giving effect to intervening legislation.

The second trend of exposition presents a more direct justification for the decision. The court now reasons that a codicil is a will within Section 184 of the Dec. Est. Law. Section 2, Dec. Est. Law, Definitions, reads, "The term 'will', as used in this chapter, shall include all codicils as well as wills." This interpretation is logical. Both instruments must be executed in the same manner and both are subject to same laws and rules of construction.

A spouse who executed a will prior to August 30, 1930 is today constrained from effecting the slightest change in any dispositive provision, by a codicil. Via the instant case, he would thereby visit upon his estate the stringent effects of Section 18, Dec. Est. Law, i.e., create a right of election in the wife.

Surrogates Wingate and Slater, who wrote the respective opinions at bar, were both members of the drafting commission of 1928, which submitted Section 18, Dec. Est. Law. To those who feel that the threads of legal reasoning are being strained to give effect to the above section, at the expense of defeating the desired disposition of a testator, the court offers, that dower and its modern substitute - election, is must favored by the law; that the power to make any testamentary disposition is a privilege and not a right; that a person exercising the right of testamentary direction (by codicil or will) subsequent to August 30, 1930, is presumed to accept the conditions imposed by the legislature.

- G. M. S.

* * *

PRACTICE - CONSTRUCTIVE SERVICE ON RESIDENT - NECESSITY FOR PRIOR ATTACHMENT UNDER C. P. A., SEC. 232, SUB. 6

The case of Karchman v. Karchman, (224 A.D. 773) appears to raise an interesting question as to the proper interpretation of Sec. 232, subd. 6 of the Civil Practice Act which states the requirements for securing an order for service by publication in an in personam action. The subdivision under discussion reads as follows: "* * or where it appears by affidavit that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the state." The question raised is: does this section require the securing of a warrant of attachment as a condition precedent to the obtaining of an order for service by publication in all in personam actions or only in a case in which the defendant is a non-resident? This question up to the time of the Karchman case has never been flatly adjudicated, but, in the opinion of the text writers, the section has applied only to actions in which the defendant was a non-resident. (Carmody's New York Practice, p. 119, sub-note 35).

The facts of the Karchman case are as follows: Plaintiff and defendant were husband and wife. Both were residents of New York State and the marriage domicile was in New York. Defendant ran away with another man and wrote plaintiff that she had no intention of returning. Plaintiff had a cause of action against defendant for money had and received. He made diligent search to ascertain her whereabouts and being unsuccessful he made application to the County Court for issuance of an order for service by publication under the provisions of Sec. 232, subd. 1 of the Civil Practice Act. Plaintiff was granted the order and published in accordance with its requirements and secured a default judgment which he satisfied against property of the defendant in this State.

Now, more than a year later, defendant brings this present action in the Supreme Court to vacate and set aside plaintiff's judgment upon the jurisdictional grounds "that no seizure of defendant's property within the State was made by warrant of attachment or otherwise until the sheriff's levy by virtue of the execution issued upon the judgment." Other jurisdictional objections to the validity of the judgment were raised which are not germane to the present discussion and which were readily disposed of by the Court. Judge Brewster, before whom the motion was argued, awarded judgment to plaintiff on the ground that there was no irregularity in securing the order of service by publication since it was necessary to secure a warrant of attachment only in the case of an action against a non-resident. Accordingly defendant's motion was denied.

Defendant appealed to the Appellate Division from Judge Brewster's decision and in a memorandum opinion, all justices concurring, the order was reversed and the judgment vacated. The only ground stated was "that the judgment was recovered by default in an action brought to recover a sum of money only; no warrant of attachment was granted in the action and no service

of the summons was made on defendant except by publication." The case of Dimmerling v. Andrews, (236 N.Y. 43), was the only case cited by the Appellate Division in support of its conclusion.

It is unfortunate that the Appellate Division did not write a full length opinion so that their exact reasoning as applied to the interpretation of Sec. 232, subd. 6, could be examined. Under the circumstances, however, it is possible to take their conclusion and by the process of induction, to retrace their mental footsteps.

In the first place it will be readily conceded that a levy under a warrant of attachment is necessary to secure an order of service by publication against a non-resident. (Pennoyer v. Neff, 95 U.S. 714; Dimmerling v. Andrews, supra). But in the Karchman case defendant was not a non-resident. She offered no proof of any change of residence. The only allusion which she made to it was in her moving affidavit in which she stated that about May 1, 1925, she separated from her husband while residing at Granville, N. Y., and that she then went to Baltimore, Md. "to reside and still resides there". When, if at all, she became a non-resident of New York she does not show. Assuming that she had the intent to set up a new domicile in Maryland it is extremely doubtful if she could do so as long as she remained the wife of plaintiff whose domicile was and continued to be in New York. (C.J., p. 414, §33; McGowan v. McGowan, 18 Misc. 708; aff'd. 14 A.D. 368, aff'd. 104 N.Y. 558). So, since defendant offered no proof of a change of residence, and since her residence continued to be in New York as long as the marriage relation existed, it is inconceivable that the Appellate Division could have decided as it did on the ground that defendant showed herself to be a non-resident. The only other conclusion is that the Court, accepting defendant as a resident, laid down the rule that Sec. 232, subd. 6, applies to resident and non-resident defendants alike.

The Appellate Division cited as authority for its reversal the case of Dimmerling v. Andrews, (236 N.Y. 43). We cannot possibly have any quarrel with what that case held. But the decision in that case was based solely on the ground that the defendant was a non-resident. The opinion was carefully confined to that situation. In that case an attachment was absolutely necessary, as without it the court was without jurisdiction. (Pennoyer v. Neff, 95 U.S. 714). But, in the case were are considering, the problem of securing jurisdiction over the defendant is not presented. Defendant is a resident of New York State. She is, therefore, within the jurisdiction and amenable to its process. (Mackey v. Gordon, 34 N.J.L. 286). There is no constitutional necessity of attachment in order to secure jurisdiction of a resident defendant by constructive service. (Continental National Bank v. Thurber, 74 Hun 632; aff'd. 143 N.Y. 648). If the Legislature intended to impose upon every plaintiff who sought to bring an action under Sec. 232, subd. 6, the unnecessary burden of attaching property of a resident defendant, it had a perfect right to so declare. "Every sovereignty has power to

regulate the procedure of its courts and prescribe the rights which plaintiffs may acquire and the liabilities which may be imposed on resident defendants by judgments recovered in its tribunals." (Hunt v. Hunt, 72 N.Y. 217; Schibsly v. Westerholz, L.R. 6 Q.B. 155). But, if it had so intended, would it not have made its declaration open and unequivocal?

The courts in interpreting sections of the Civil Practice Act dealing with constructive service usually quote the time honored phrase, "the statute is in derogation of common law and must be strictly construed." This is very true in the case of constructive service on non-resident defendants. It is not true of constructive service on resident defendants. "Acquiring jurisdiction of resident defendants by constructive service of process is a proceeding according to the course of the common law." (Continental National Bank v. Thurber, supra). Constructive service was not unknown to the common law, but was an authorized mode by which the English courts of law, and of equity, from the earliest times, acquired jurisdiction of resident defendants. (3 Black. Com. 353, 445).

The purpose of adding the clause "where it appears by affidavit that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the state" was to limit by express words the power to grant the order of publication to cases where, a warrant of attachment being a prerequisite to a judgment, it had already been levied. It prescribed that the warrant of attachment must be levied before an order for publication will be granted. The time of levying an attachment was the point that this clause intended to settle. (Dimmerling v. Andrews, supra). "The clause clearly does not increase the power of the court." (idem). It was not intended to be applied to a case where attachment was not necessary. It should be applied only to cases in which attachment is constitutionally necessary to acquire jurisdiction of a defendant.

The final answer to the question of whether attachment is necessary must rest with the Court of Appeals. The question itself is an important one. The law as declared by the Appellate Division in the Karchman case makes it necessary for lawyers to observe a hollow ritual. It prescribes a course of action which is an empty form. It makes attachment a necessity in an action against a resident when there is no reason, constitutional or otherwise, for requiring it. The purpose of code practice and the modern philosophy of legislating is to simplify procedure. The interpretation of the Appellate Division imposes the requirement of needless detail which serves no useful purpose.

- W. C. S.

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TORTS - NEGLIGENCE - AUTOMOBILES - LIABILITY OF INSTRUCTOR FOR INJURY CAUSED BY PUPIL.

The recent case of Greenie v. The Nashua Buick Co. (N.H.), (158 Atl. 817) is an interesting application of negligence law. The plaintiff was injured when the car which she was driving collided with a car operated by one Peck who at the time was learning to drive. Peck who was 74 years old had had no prior experience with a "gear shift" car although he was licensed to drive a Ford. One Tarbell, an agent of the defendant, was the instructor and failed to see plaintiff's car approaching. The car proceeded from the garage across an eight foot sidewalk and was near the center of the road when the collision occurred. Plaintiff was coming along the street and expected defendant's car to stop. Plaintiff sued both Peck, as driver, and the Nashua Buick Company for the negligence of its servant, Tarbell.

The verdict as brought in by the jury - in favor of the plaintiff against the Buick Company and in favor of Peck against the plaintiff - seems, at first, to contradict itself. The driver was absolved from negligence and the Buick Company held liable for the negligence of its servant who, although an instructor was not actually controlling the destiny of the car. The motor vehicle law in that state permitted an unlicensed person to drive while being instructed if accompanied by a licensed chauffeur or operator. The purpose of this statute was to protect the public against injuries by persons unfamiliar with a car. Although Peck was licensed he was totally unfamiliar with the operation of a gear shift car as was demonstrated by his actions and admission after the accident. Consequently, Tarbell, the defendant's agent, was in control of the car and any negligent failure of his to control the car so as to avoid harm to travelers would impose liability on the defendant.

The court declared that Tarbell might have been negligent in one of two ways, either by letting an inexperienced driver operate on a busy thoroughfare or failing to discover the plaintiff's car approaching and warning Peck or applying the emergency brake.

The argument of the defendant, Buick Company, was based on the proposition that since the jury absolved Peck, the verdict found, "that he operated the car competently and with due care so far as this collision was concerned". The court dismissed this contention by stating, "Even though Peck realized his limitations as a driver, it might be found that having placed himself under Tarbell's direction for the purpose of receiving instruction he was justified in relying on Tarbell's judgment as to the proper time and place for him to undertake the actual operation of the car. No exoneration of Tarbell would be implied in such a finding." Further, "A finding that Peck did as well as the ordinary man with his qualifications would have done clearly involves no finding that his instructor was similarly free from fault in permitting him to act as he did."

The Court in so deciding relied on the line of cases wherein plaintiffs recovered from the masters whose instructors were negligent while teaching the purchaser. The case of Holmboe v. Morgan, (69 Ore. 395) is exactly in point. Morgan was the prospective vendee who was driving with one Robinson, an agent of the defendant, Howard, who was the owner of the salesroom. Both Morgan and Howard were sued and the jury brought in a verdict only against Howard. There the Court said, "He (Robinson) was in charge of the car and was to instruct Morgan as to running it, and, if he thought they were in a locality where the car should be in the hands of an expert, he should have taken control." (p. 401).

In the case of Opecello v. Meads, (152 Md. 29) the situation was somewhat different. There the car which injured the plaintif was owned by Louis Cremona who employed Frank Cremona to give lessons to Opecello who was driving the car at the time. The jury brought in a verdict against all three defendants. This finding impliedly says that the actual driver was negligent, which element is lacking in the two prior cases. In upholding the verdict against the owner for the negligence of his instructor-employee the court said: "If he had seized the wheel when the danger first became apparent, and had diverted it from the line of its progress toward the plaintiff the injury to her as the jury could conclude from the evidence, might have been obviated * ** For any negligence of the instructor in the control of the car there can be no doubt that the defendant who employed him to perform instruction service and who provided the car for the purpose would be liable." (p. 34).

The absence of privity between the driver and the owner is no disadvantage to plaintiff. In fact it is a distinct advantage when considered in connection with the memorandum of decision in Rosenkrantz v. The Standard Motor Service Co., (181 A.D. 886), which reversed a judgment for the plaintiff against the principal (liable only under respondeat superior) where there was no finding against the driver. The liability predicated in Greenie v. The Nashua Buick Co., (supra) is on the theory that the instructor is negligent in controlling the driver's operation. This ground of liability is quite distinct from the statute (Vehicle and Traffic Law, Sec. 59) in this State which imposes a liability when the driver has the owner's permission but operates negligently. A finding by the jury that the driver was not negligent would free the owner from any liability.

While in the case under consideration the verdict at first appears to be inconsistent, in truth it is not so when the inexperience of Peck is contrasted with the duty of Tarbell. This latter duty was negligently performed while Peck was acting as carefully as he was able under the circumstances.

--J. E. W.

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